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ABSTRACT OF THESIS

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Title of Thesis THE LAW AND PRACTICE OF IMMIGRATION CONTROL IN THE UNITED KINGDOM
AND KENYA

The thesis deals with the law and practice of immigration control in the United Kingdom and Kenya. A study of the law and practice of immigration control naturally falls into the fields of Constitutional and Administrative Law. Therefore, although attention will be focused on the analysis of the immigration laws and their administration one must remember that the problems that are raised invariably touch on various aspects of Constitutional and Administrative Law.

Part I of the thesis first examines the scope and content of certain important aspects of the immigration laws of the two countries. The matters examined are:

- (i) those relating to people who have the right of free entry and stay, that is, patrials and citizens;
- (ii) those relating to the rules and regulations for the guidance and administration of control;
- (iii) those relating to appeals and
- (iv) those relating to deportations.

The thesis then deals briefly with the purposes or ends that the immigration laws are intended to serve in each country.

Part II of the thesis contains detailed examinations of the administration of the laws in the U.K. and Kenya in that order. The administration of the laws extends from pre-departure requirements, to the purposes for which one may apply for leave to enter a country and to the regulations such a person is subject to if allowed entry and stay.

The detailed examination of the United Kingdom and Kenyan immigration law and systems of control inevitably entailed separate treatment because of the many differences between their laws and the varied methods of administration of the laws. Where possible, however, comparisons have been made between the two systems.

Part III is devoted to a comparative examination of the control of discretionary powers of the immigration authorities in both countries through administrative and judicial means. The constitutional importance of such control cannot be over-emphasised.

The final section of the thesis suggests the most urgent amendments that should be made to the immigration laws of both countries if the laws are to become more consonant with the constitutional requirements of civilized societies that believe in the liberties of individuals. The suggestions are by no means exhaustive and should not be taken to mean that the thesis is exclusively reform-oriented.

Finally/

Use other side if necessary.
Use this side only.

Finally, it must be mentioned that immigration will probably always remain an aspect of state sovereignty of all countries. For this reason countries will be, in varying degrees, unwilling to surrender its control entirely to an independent adjudicator. Be that as it may, it is the assertion of this thesis that human rights must always take precedence over the notion of sovereignty and to that extent there is a case for arguing that the U.K. and Kenya, indeed all other countries of the world, owe it to humanity to start moving towards making immigration entirely a matter of law of rights.

THE LAW AND PRACTICE OF IMMIGRATION CONTROL
IN THE
UNITED KINGDOM AND KENYA

JARED BENSON BIRUNDU KANGWANA, LL.B.

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DECLARATION

I Jared Benson Birundu Kangwana do hereby declare
that this thesis was composed by me and is entirely
my own work.

Signed

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J.B.B. Kangwana
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TO MY DEAR WIFE

TABITHA

WITHOUT WHOSE SUPPORT AND PATIENCE THIS
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INTRODUCTION

Immigration has received much publicity in recent times. It has been a topic of intense and passionate debates and discussions. Some highly charged literature has been written on it. In many ways the causes have been the massive movements of people from one country to another. Modern societies are typically characterised by these movements. The United Kingdom and Kenya, on which this thesis will focus, are examples of countries that are experiencing the movements. In both countries are to be found people of different races, colours and nationalities. They may be permanently settled, they may be working, they may be students, they may be visitors or tourists and they may also be engaging in business. Whatever each one individual is pursuing the result is the production of an amalgam of people of different races, colours and nationalities in one country.

Until recently immigration was, relatively, of little importance in the United Kingdom and Kenya. In the sixties, however, there was, in both countries, a sudden upsurge of public demands for more control of immigrants. Many writers see a causal connection of these public demands with racial consciousness, political manipulation and economic conditions of both the receiving countries and the 'exporting' countries. Whereas occasional references will be made to those things, the scope of this thesis will be limited to the analysis of the immigration laws of the United Kingdom and Kenya. It must be mentioned at once that the immigration authorities are clothed with a lot of discretion in the execution of their daily duties. Part of this thesis will be devoted to this area which still remains largely unexplored. In particular, the ways by which these discretions are checked will be examined.

The history of the development of immigration law in each country which will be looked at now is a necessary background for the appreciation of the present laws.

United Kingdom

The U.K. Immigration Act of 1971 may be termed as a point of convergence in the history of its immigration law. Before then there were two distinct systems of immigration laws: one for aliens¹

and the other for the nationals of British colonies and the Commonwealth countries.

In general nationality goes back to the time of Prince John and the loss of Normandy under him² in the 11th century. At this early period control was aimed merely at the King's enemies irrespective of allegiance or nationality.³ It is only in the 17th century that there began to emerge an organised control of immigration of aliens as the distinction between subjects and aliens became clear. Allegiance became co-extensive with nationality and the former was a condition precedent to becoming a national.⁴

Aliens

In 1793 the first Aliens Act⁵ was passed. The express purpose of the Act was, in the words of Lord Glenville, the then Secretary of State:

"for establishing Regulations concerning Aliens in this Kingdom or resident therein, in certain cases."⁶

The Act was a forerunner to later Acts on immigration which draw a lot from it. T.W.E. Roche has himself remarked that the restrictions imposed on the aliens:

"were similar to those imposed on aliens in 1914 differing from them...in two prominent points, first that their enforcement was left to magistrates, the King having no organised police to undertake the duty; secondly, that the return of an expelled alien rendered him liable on his conviction to transportation and, if he returned a second time, to capital punishment."⁷

By modern precedents what the King lacked was an organised immigration civil service at ports of control. It is worth noting that officers of the Customs Service were also used. They still continue to play this role albeit on a diminished scale.⁸ The Act required each alien to submit written submissions to the Chief Magistrate within 10 days of their arrival giving:

"full and true account in writing of his or her Name, Rank, Occupation, or Description and also of his or her Place of Abode specifying the street and number...in and at which he or she shall be dwelling, and of the length of time during which he or she shall have been resident within the United Kingdom and the Place or

"...Places of his or her principal residence during six months immediately preceding his or her delivering such account."⁹

This provision forms the central feature of control of aliens under the Act. The Act remained in force until 1803 when it was repealed by another Act¹⁰ which gave the Secretary of State draconian powers to deport an alien on mere suspicion.

The above controls were relaxed by the William IV Act¹¹. Towards the end of the 19th century there was an influx of people from Eastern Europe who found it easy to enter into the U.K. as immigration control was lax. For the first time ever there was a furore of public outcry against the uncontrolled entry of aliens who, it was alleged, were causing a fall in living standards. No time was wasted in appointing a Royal Commission on Alien Immigration. The Commission published its report in 1903. In a nutshell, it urged the exclusion of certain categories of alien immigrants (those of bad stock) and made recommendations for the appointment of officers to carry out the task of control.¹² The recommendations were embodied in the 1904 draft of the Aliens Bill which became law in 1905. The Act stipulated also that alien immigrants were to land at specified ports.

With the outbreak of the First World War in 1914 it became imperative that the control of aliens at the ports of entry and inside the country be more thorough. Accordingly the Aliens Restriction Act of 1914 was passed swiftly as part of the war effort. It replaced the 1905 Act and placed in the hands of the Secretary of State wide discretionary powers to control the movements and activities of aliens in the course of the war. For the first time, notes T.W.E. Roche:

"Here was laid the foundation of the service (immigration officers) as we know it today."¹³

From 1914 it also became necessary under the law for every person entering the country to produce a passport or other document of identity and each person had to undergo the scrutiny of immigration officers. The latter requirement has come under fire from some writers in recent times.¹⁴ It is feared that it contravenes constitutional principles relating to privacy and human dignity.

In 1916 there was an Order in Council which made it compulsory for all aliens to register with the police once they are

in the country. This has been continued to the present.

With the declaration of the 1920 Aliens Order the immigration law relating to aliens was at last laid down along sound lines thus paving the way for a firm foundation. T.W.E. Roche has summed up its effect thus:

"...no alien might land without the leave of an immigration officer, nor elsewhere than an approved port: the immigration officer might refuse leave to land to any alien or might attach such conditions as he saw fit to the grant of leave to land; he might not grant to five types of aliens (those excluded). There were numerous other powers, duties and penalties..."¹⁵

The Aliens Order of 1920 remained in force until 1953 when there was a new Aliens Order which brought the former Orders up to date. With the passage of the Immigration Act of 1971, the 1953 Aliens Order was repealed and aliens were brought within the purview of the 1971 Act.¹⁶ Aliens are therefore controlled under the 1971 Act.

Since the entry of the United Kingdom into the European Economic Community Britain is bound, under the Rome Treaty relating to the free movement of labour¹⁷ within the member countries, to apply differential treatments to the nationals of the Community. Rules have been made by the Secretary of State under the 1971 Act to cater for them and these rules give the impression that nationals of member countries are more leniently treated than other aliens. This development is altogether unique in that it represents a shift on the part of the Government to use immigration law as a means of economic integration rather than as a means of racial integration which was the purpose of the 1971 Act.

Commonwealth Nationals

The second leg of the history of immigration law of the U.K. is that of the nationals of the Commonwealth countries. Traditionally Commonwealth nationals enjoyed free entry into the U.K. At the beginning of the 1960s there started a wave of anti-Commonwealth immigration which has culminated in the passing of the 1971 Immigration Act placing Commonwealth nationals on the same footing as the aliens.

Any discussion of Commonwealth immigrants starts with the arrival of the Empire Windrush at the port of Avonmouth in June 1948

from the West Indies. It is said that this was the beginning of the arrival of Commonwealth immigrants in the U.K.¹⁸ The United Kingdom had hitherto been regarded as a non-immigration country as the movement of the U.K. nationals had been in an outward direction. One fact that is often overlooked in the study of immigration law is the decision of the Labour Government to give independence to India after the War. As India became a Republic within the Commonwealth it was necessary to effect a modification to the 1948 Nationality Act of Britain. The change effected was a fundamental one. It enabled both countries to fit their citizenship laws into a new overall framework of British citizenship. It is as a result of this that the United Kingdom has been otherwise relieved of its legal obligations to members of her former colonies whom it regarded and treated as her own citizens. Most of these colonies are now independent within the framework of the Indian model. But of even more importance, however, because of the modification to the British Nationality Act it is with ease that pressure has been brought to bear on the Government to curb immigration from Commonwealth countries. The severance of the former links with colonies and in particular the modification to the British Nationality Act left politicians free to respond to public demands without incurring international condemnation for abandoning their legal and moral obligations to her own subjects.

After World War II there was a steady flow of Commonwealth immigrants into the U.K. In particular, there were many West Indians, Indian and Pakistani nationals. Succeeding British Governments were aware of this and they employed various controls by administrative means. These means did nothing to abate the pace of the flow of the immigrants. Consequently the U.K. was forced to enter into 'agreements' with India, Pakistan and Jamaica in a bid to slow down immigration. Unanimity on such matters as imposing restrictions on the issue of passports or demanding that a person deposit a large sum of money before leaving for the U.K. was reached.¹⁹ But with no way worked out on the sharing of responsibilities the measures failed en masse. Notably, there was a racket of false passports and other documents in India which enabled people to travel to the U.K. in spite of the restrictions on the issue of passports there. So, the whole purpose of the 'agreements' was defeated.

By 1962 the Conservative Government was pressurised to breaking point by public demands to stop immigration of coloured people into Britain²⁰ - this was a parallel to the public furore at the end of the 19th century. It is in this background that the British government for the first time introduced legislative measures to control Commonwealth immigrants. This was done by the passing of the Commonwealth Immigrants Act of 1962. The effect of the Act was noticeable in the balance of the labour force which switched progressively from unskilled to skilled and professional workers by the use of a selective system of regulating the issue of employment vouchers designed to meet the needs of the market and, in the balance, within the immigration which changed from a preponderance of wage earners to a preponderance of dependants.²¹

The 1962 Act proved inadequate through the abuse made of it by people who started to enroll themselves as students when in fact they were not. This came about as a result of the special privilege given to students in the priority of entry. There was also a widespread falsification of documents to enable people to get almost unrestricted entry. These were practical difficulties on the part of the administration calling for stern legislative entry measures.²² But perhaps the most important thing that led to the amendment of the 1962 Act is that at last there was a definite Government policy on Commonwealth immigration to which administrative controls previously pursued would henceforth be secondary. Control by administrative means was always a measure of expediency. The new policy was, broadly speaking, what has been described as:

"The Little England policy based unilaterally on the social and economic needs..."²³

of the U.K. It is on this policy that the Commonwealth Immigrants Act of 1968 was generally based. The measures introduced by the 1968 Act were regarded in some circles as an invasion of civil liberties and, in particular, the powers of deportation intended to help stamp out the evasion of the immigration rules.²⁴ The criticisms gave birth to what, in the view of this thesis, was the greatest innovation in the history of immigration law in the U.K. The Wilson Committee was set up in 1967 to look into the setting of a formal inquiry into immigration control procedures. Its recommendations were accepted by an Act of Parliament in 1969 which established a system of Immigration Appeals Tribunals. Although

the 1969 Act was repealed by the 1971 Immigration Act the Appeals Tribunals have been retained in the new Act. The decisions of these Appeals Tribunals are a major insight into the working of immigration law to aliens and Commonwealth nationals besides being one of the best known methods of checking discretionary powers of immigration officials.

The 1968 Commonwealth Immigrants Act was repealed partly due to a crystallisation of the general Government policy as indicated above resulting in the introduction of the "Patrial" concept and partly due to the need to plug more tightly the loopholes open to Commonwealth immigrants. Some of the many considerations that brought these policies into being will be looked at later.

As has been noted the Immigration Act of 1971 brought under one umbrella all non-patrial Commonwealth nationals and aliens for the first time. It retains the system of appeals introduced by the 1969 Immigration Appeals Act. The overall picture that emerges from all these measures is that the Government is determined to streamline immigration law and employ it as an instrument for limiting the number of immigrants coming into Britain, particularly coloured immigrants, by restricting entry to those coming to work in needy sectors of the economy. Settlement of immigrants is to be discouraged by all means. It is perhaps paradoxical that the 1971 Act opens an avenue for millions of Commonwealth nationals of European stock to come into Britain and, if they wish, settle without any checks on them. This is the ^{logical outcome} ~~antithesis~~ of the patriality concept.

Kenya

The development of immigration law in Kenya must be seen in the historical context of the country itself. This may be roughly divided into two phases, that is, the colonial phase and the independence phase. The first phase represents the period of the 1890s to 1963 and the second phase from 1963 to the present.

During the colonial phase there was an active British interest in Kenya. As far back as 1902 the British Government was anxious to see the annexation of Kenya carried out.²⁵ European settlement in Kenya was a matter of high priority and the Government actively encouraged it. Varying methods to encourage settlement of "White Settlers" were used but the most commonly acknowledged one was alienation of land in the cool highlands exclusively to Europeans.²⁶

At this time there were no legal restraints on the part of the Europeans to immigrate into Kenya. The only known immigration controls were brought in in 1906 to limit the number of Asians²⁷ immigrating into the region. The limitations placed on Asians were motivated by a desire to ensure the continuance of white hegemony in the territory.

Asians were mainly railway workers, artisans and middle level to low level administrators. They were sought by the Colonial Government and early administrators to help in administering the territory. As time went by rivalry between Asians and Europeans intensified, particularly on questions of alienation of land to Asians in the upland area and Asian representation in the Legislative Council. By 1920 there was an open conflict between them. The Europeans who felt more entitled to determine matters there were naturally incensed by the obnoxious demands of the Asians and accordingly advocated tighter immigration restrictions on the Asians. Later, vocal demands for the total immigration control of Asians were made by the Electors' Union in 1949²⁸ and the 1953 Conference of the Electors' Union. It is indeed paradoxical that the attitude of Europeans had not been affected by the distinguished services of Asians during the war in defence of the Western democracy and civilisation like in the U.K. where immigration of Commonwealth nationals was directly related to the war.²⁹ For this reason it is hard to conceive that even as late as in 1953 the Conference of the Electors' Union should have been heard to resolve that there should be:

"no further Asian immigration into Kenya except for the employment of key men on a temporary basis."³⁰

What is more difficult to understand is the basis of these resolutions as there were no citizenship laws at the time in Kenya. It is said of the Asians by way of justification of these measures that they had no stake in the country, that they were:

"temporary residents whose sole purpose was to make as much money as possible before retiring to India."³¹

It is deducible that the measures to restrict Asian immigration were merely discriminatory on grounds of race. Nothing shows this more glaringly than the 1956 Immigration Ordinance which was passed as a

response to the demands of the European settlers. The Act placed wide discretionary powers and control in the hands of the Principal Immigration Officer. It is in line with the policy of the Act therefore that from the 1st of July 1956 to the 31st of December 1957 958 European applications for certificates of permanent residence³² were granted and 19 were refused. For Asians 227 were granted and 68 refused.³³ The 1956 Immigration Ordinance was amended in 1959 to further consolidate the hold of Europeans in Kenya.

The independence phase is initially characterised by the passage of citizenship laws. Until 1967 the 1956 Act³⁴ as amended³⁵ remained in force. In the Independence Constitution of 1963³⁶ there was a provision inserted to the effect that non-citizens who were ordinarily and lawfully resident in Kenya on the date of independence had a right to reside in the country and were free from deportation.³⁷ Both of these placed severe limitations on the part of the Kenyan Government to deal with immigrants.³⁸

In pre-independent Kenya non-Africans and, in particular, Europeans and Asians, though numerically small, held all the key positions in the public and private sectors. With the advent of independence many Africans looked to it not merely as:

"a transfer of sovereignty into African hands, but as implying a new emphasis upon African participation in high level posts..."³⁹

In other words African participation in top posts in all sectors of the economy was urged and, indeed, it was looked upon as the only guarantor of true independence, national security, economic development and political stability. This necessitated a fundamental revision of colonial priorities which the Government could not do while it was bound by the Constitution and the Immigration Act passed during the colonial era. With mounting African pressure the whole colonial stratum had to be dismantled in one way or other.

The Government's first response was the amendment of s. 25(3)(d) of the Independence Constitution.⁴⁰ Although the amendment gave the Government a free hand in ^{dealing} dealing with non-citizens resident in Kenya it was soon discernable that it did not go far enough. Immediately the question of the future of the immigrant communities in Kenya became one of crucial importance. This was a central problem as the Kenyan Constitution does not allow dual

citizenship. It is in this background that the Immigration Bill of 1967⁴¹ was introduced. It was passed into law in the same year as was expected. From then the future of immigrant communities in Kenya was curtailed. By and large the Asian immigrants were the ones most adversely affected by the measures introduced by the 1967 Act and others which⁴² allowed preferential treatment to Africans in matters of employment, trade licensing & loans among other things.

The Act gave immigration officers and the Minister for Home Affairs wide powers of dealing with immigrant communities in all areas. It is a sign of the depth of commitment to the Africanisation sentiment that in spite of the wide powers given to immigration authorities and the Minister for Home Affairs, some members of Parliament felt that the Act did not go far enough.⁴³

For the first time the 1967 Act gave immigration authorities power to deport non-citizens, which their predecessors were not allowed to do. These powers have surely been used.⁴⁴

It can be said by way of conclusion that the Immigration Act of 1967 was introduced to underwrite the Africanisation policies in general. The detailed provisions and the means by which immigration authorities' discretion is checked will be examined.

FOOTNOTES
(Introduction)

1. Control of aliens in Britain started roughly in the 12th century. An alien is a person who is not (a) a British subject, (b) a British protected person or (c) a citizen of the Republic of Ireland. In Kenya immigration controls were introduced for the first time in 1906.

2. C. Parry p. 28 and T.W.E. Roche p. 17.

3. C. Parry p. 28.

4. Englishmen in colonies were British subjects: dictum in CRAW v RAMSEY (1669) Vaugh 274 quoted in C. Parry p. 54.

5. Statute no. 33 Geo. III.

6. T.W.E. Roche p. 47.

7. Ibid. p. 48.

8. H.C. 81 (1973) and H.C. 79 (1973).

III

9. Statute no. 33 Geo./Part. XIX. Quoted in T.W.E. Roche p. 51.

10. Statute no. 43 Geo. III Cap. 155 (1803): Repealed by Act of William IV Cap. XI (1836).

11. Ibid.

12. Those to be excluded were (a) persons convicted of any crime in any foreign country within 5 years; (b) prostitutes; (c) people living on the proceeds of prostitution; (d) people who were likely to be a charge on public funds; (e) people with no visible or probable means of support and (f) people of notoriously bad character.

13. T.W.E. Roche p. 79.

14. See generally R. Moore and T. Wallace.
15. T.W.E. Roche p. 99 and I. Macdonald p. 8.
16. The Immigration Act 1971 Schedule 6.
17. E.E.C. Treaty, articles 48 and 49; European Communities Act 1972, s. 2(1),(2) & (3). Detailed provisions on the freedom of movement found in E.E.C. Council Regulation 1612/68.
18. T.W.E. Roche p. 205.
19. The Indian Government introduced a check on the issue of passports in 1955 and 1958 on the request of the U.K. Government. The Commonwealth Relations Office also had informal talks with the Pakistan Government as a result of which there was a requirement on intending immigrants to deposit £187.50 before leaving for the U.K. Further the Senior Manley Commission of 1956 to the West Indies had the same intent of restricting immigrants into the U.K. at source. The practices continued until 1962 when British controls came into force as a result of legislation.
20. For example, 1958 Nottingham Dale Disturbances.
21. E.J.B. Rose chapter 8.
22. Cmnd 3064; E.J.B. Rose *ibid*.
23. E.J.B. Rose p. 229.
24. I. Macdonald and E.J.B. Rose generally.
25. In 1902 there was a discussion in the Foreign Office as to the desirability of annexing African Protectorates. In the case of Kenya there was particular urgency since the Government wanted the cost of the Uganda Railway repaid and the control of the Nile established. See Y.P. Ghai and J.P.W.B. McAuslan. Part I chapters II and III.

26. As early as 1908 the Liberal Government had stated that "as a matter of administrative convenience grants in the upland area should not be made to Indians" and in 1915 the Crown Lands Ordinance gave the Governor power to alienate land in the upland area to Europeans only. Y.P. Ghai and J.P.W.B. McAuslan. pp. 80 and 81.
27. The term "Asian" denotes people from India and Pakistan.
28. The Electors' Union re-affirmed the policy of severe restrictions upon Asian immigration and asserted that it was their right and duty to secure an immigration policy that would enable them to build a population in E. Africa and maintain a British Dominion and the British way of life. D. Rothchild p. 77.
29. For example, soldiers who had been in the war service came to the U.K. from the West Indies.
30. Havelock Papers File H/13. Index to Report of August 1953 - February 1955 (mimeo). Also D. Rothchild p. 77.
31. D.P. Ghai and Y.P. Ghai p. 5.
32. Class G.
33. D. Rothchild p. 78.
34. Statutes of the Independence Legislature whether passed or adapted are called Acts.
35. The Immigration Act and other Acts were reviewed by the Nyamweya Working Party on Discriminatory Laws which recommended the removal of all discriminatory provisions based on race. This was accepted by Parliament in 1963.
36. Independence Constitution s. 25(3)(d).
37. The provision probably went beyond the norms of international

law and in a sense was a serious limitation on the sovereignty of the state. See Y.P. Ghai (1967) 3 E.A.L.J. p. 195.

38. In Kenya no distinction was made between Commonwealth citizens and aliens for the purpose of immigration as in the U.K. Non-citizens were and are treated equally except for the indigenous citizens of the two sister states, Uganda and Tanzania, who have virtually free rights to entry.
39. D. Rothchild (1969) Modern African Studies, volume 4 & 7 p. 690. When moving the second Reading of the Immigration Bill the Vice President and Minister for Home Affairs argued that the slow pace of Africanisation was due mainly to the fact that the 1956 Act gave him no power to control employment of non-citizens once they had qualified for the issue of resident's certificates: N.A.D.K. 20th July 1967 volume XII, col. 2 493.
40. Amended by Act no. 14 of 1965. An amendment of constitution needs to be supported by not less than 65% of all members of the National Assembly.
41. Cap. 172 Laws of Kenya.
42. For example, the Trade Licensing Act 1967, the Land Control Act 1967 and the creation of the Kenyanisation Bureau to provide information to the immigration authorities of the Kenyans available to take jobs.
43. For example, M. Shikuku was disturbed by the low rate of refusals; N.A.D.K. 23rd Sept. 1968, vol. XVI col. 1108.
44. For example, on 5th July 1967 the Vice President deported 5 Europeans and 7 Asians. They were allegedly creating and promoting by their attitudes and actions situations of racial conflict; Official Report of the National Assembly 6th July 1967. 1st Parliament, 5th session.

PART ONE

PART ONE

THE SCOPE AND PURPOSE OF IMMIGRATION LAWS IN THE U.K. AND KENYA

In this part the scope and purposes of immigration laws in both countries will be examined in some detail. Chapter one will be an examination of the following topics: (a) people who have the right to free entry in each country and how that right is acquired; (b) the Rules and Regulations that are part of the laws; (c) the immigration appeals system of the U.K. and lastly (d) the grounds and methods of deporting immigrants.

The topics are a small portion of the number of topics that could be made out of the laws, but since they are the most important to immigration law detailed examination will be limited to them. Many more questions than can be answered will be raised. The law is so complex and full of gaps that any examination will naturally lead to an examination of certain implications of various provisions. Accordingly some side issues will be pursued from time to time to establish the complexity or the gaps of the various provisions, and, where possible, the examination of such side issues will be kept to the minimum.

Chapter two will be an attempt to discover the purposes of immigration laws in both countries. Generally speaking, the ends that such laws serve may be the purpose. One must also look at the motives of the legislators and the public at large to establish the purpose of a law. We will examine both the ends that the laws serve and the motives of the legislators and the public and from them draw conclusions as to the purposes of the immigration laws.

CHAPTER ONE

In the U.K. the Immigration Act of 1971, which is the main source of immigration law, represents a codification of what used to be separate and distinct systems of immigration laws for aliens and Commonwealth citizens. The Act gives the Secretary of State new powers in that he can now deport a Commonwealth citizen from the U.K. if he deems the deportation of that person to be conducive to the public good.¹ He did not have this power before. Certain

powers like those empowering him to require aliens to register with the police² are retained. The Act does not, however, impair the powers exercisable by the Crown in relation to aliens by virtue of prerogative powers.³

In most other respects the 1971 Act not only codifies the laws that existed previously, but also assimilates them. From the point of view of bureaucratic and administrative efficiency the assimilation and codification of the laws is a salutary step. If the law is properly used without abuse it can only lead to the promotion of efficiency and to the benefit of all concerned. For example, in 1973 nearly 7 million people entered the U.K.⁴ That works out to nearly 20,000 people going through the U.K. ports each day. Since immigration officers have to scrutinise each person individually it saves time to apply standard rules for each instead of first finding out whether one is an alien or a Commonwealth citizen and then thinking what rules to apply. It is therefore important that the immigration laws are now under one Act. There are also a number of good political reasons for assimilating the two systems of immigration laws. For example, Britain's entry into the E.E.C. was definitely a very important and decisive political influence.

(i) Patrials and Citizens

In this part we will examine the meaning of the terms "patrial" in relation to the U.K. and "citizens" in relation to Kenya.

Patrials: A patrial is the technical term given to a person who has the right of free entry (or the right of abode) into the U.K. Before we examine those who are patrials it is important to examine British nationality laws first. This is necessary for the better understanding of the patriality "concept".

Before 1948 everyone who owed perpetual allegiance to the British Crown was a British subject. As some countries within the British Empire became self-governing there was a need to identify people who would be its citizens. Thus in 1946 Canada passed its own citizenship laws. Many other countries like South Africa had their own citizenship laws. Because of the moves of those countries to have their own definition of their citizens it became imperative

for the U.K. to pass its own nationality laws. Thus, in 1948 the British Nationality Act was passed and it defined distinctly those people who were to be citizens of the U.K. and colonies, among others. The lasting effect that the Act created for the future of immigration law was that it established a continuing status of British subject. Any citizen of the U.K. and colonies, any citizen of a self-governing former British colony and citizens of the Republic of Ireland, who retained their connection with the U.K., were all British subjects. The 1948 British Nationality Act was not enacted with immigration in mind for it was assumed that:

"anyone living under the imperial aegis of Britain ..." 5

was not only entitled to call himself a British subject, but was also free to come into the U.K. without any restrictions. In order to appreciate the classes of people that the British Nationality Act of 1948 created, it is necessary to list them all.

Firstly, the Act created citizens of the U.K. and colonies.⁶

These were:

(i) persons who, or whose fathers, were born, naturalised or registered under the Act in the U.K., the Channel Islands or Isle of Man in any of the remaining colonies (then not self-governing); and in any of the Associated States in the West Indies;

(ii) persons born in foreign countries whose fathers were citizens of the U.K. and colonies by descent and whose births were registered at a British Consulate;

(iii) persons who, or whose fathers, derived their citizenship from a connection with a former colony or other dependency, but who did not acquire the new country's citizenship automatically at independence. The majority of the East African Asians fall into this category.

(iv) persons adopted in the U.K. by a citizen of the U.K. and colonies.

Secondly, the Act created two other categories of people:

(i) British subjects without citizenship - these were people who were British subjects before 1st January 1949 and potentially citizens of either the United Kingdom, Eire, or one of the Commonwealth countries listed in the British Nationality Act 1948 s.1(3), but had not

acquired such citizenship or become aliens; and

(ii) citizens of the Republic of Ireland born before 1st January 1949 who were then British subjects and have remained so by making a formal claim as provided by the Act.⁷

In addition to the above categories there were British Protected Persons. They were an anomalous class of people in that they were neither British subjects nor aliens.

Except for British Protected Persons all the other categories of people above were British subjects whether their country became independent or not. Since British subjects were free to come into the U.K. as they wished it is clear that citizens of a former British dependency as well as the existing dependencies were free to come into the U.K. whether they originated from the U.K. or not. That, of course, remained the case until 1962.

In 1965 another category of people was added to the list of British subjects. These were women who registered as British subjects under the British Nationality Act 1965⁸ by reason of their marriage to British subjects without citizenship (above) or by reason of their marriage to citizens of the Republic of Ireland who formally claimed to retain their status of British subject.

Over the years there have been many amendments to the 1948 British Nationality Act making it complex and difficult to follow. One of its most serious drawbacks is that since 1962, when immigration controls were first introduced against certain categories of British subjects, the Act has failed to give a ready definition of who has the right to enter and leave the U.K. freely. As a result of this the word patrial was introduced by the 1971 Immigration Act to try and define who of all those British subjects are still free to enter the U.K. freely. In other words, patrials are a class of British subjects who are free to enter and leave the U.K.. The right to freely enter and leave the U.K. is known also as the right of abode in the U.K..⁹

We are now ready to discover who of the British subjects are patrials. There are five different ways of becoming a patrial which we will now look at:

(i) If one is a citizen of the U.K. and colonies who has that citizenship by his birth, adoption, naturalisation or registration in the U.K. or the Islands.¹⁰ In this section patriality is

co-extensive with citizenship of the U.K. and colonies if the birth, adoption, naturalisation or registration of that person occurred in the U.K. or the Islands. Accordingly, a citizen of the U.K. and colonies born, adopted, naturalised or registered in an overseas dependency is not a patrial unless he qualifies as such under the other heads below. If he does not so qualify under the other said heads then he has no right of abode in the U.K. notwithstanding that he is still a citizen of the U.K. and colonies. In that case the effect of the British Nationality Act of 1948 is drastically changed because patriality denies free entry to any citizen of the U.K. and colonies who is not a patrial. It is submitted that immigration law should be related to citizenship and that rights of entry conferred by the status of citizenship must not be curtailed by immigration law even by a fraction. Once a citizen's rights of free entry are interfered with by immigration law then constitutional problems of the rights of free movement of a citizen are automatically attracted.

Not every person born in the U.K. and the Islands is a citizen. There are exceptions which are valid also in immigration law. Thus, the following people born in the U.K. and Islands are not citizens of the U.K. and colonies and accordingly are non-patrials and subject to immigration control:

- (a) children born to foreign diplomats who are in the U.K.¹¹ and
- (b) children born in enemy occupied territory and whose fathers are alien enemies.¹² If, however, this makes the child stateless and the mother is a U.K. citizen the child will be a U.K. citizen¹³ and accordingly a patrial by its birth. The birth must, however, have occurred in the U.K. In other words, an enemy occupied territory must be part of the U.K. and the Islands.

The British Nationality Act 1948 merely tells us that a person shall not be a citizen of the U.K. and colonies by birth if at the time of his birth his father is an enemy alien and the birth occurs in a place then under enemy occupation.¹⁴ For the purposes of the Immigration Act 1971 and, in particular, patriality, we must assume that the enemy occupied territory is a section of the U.K. or the Islands. Now, there is no comprehensive definition of the word

enemy alien, but its primary meaning is a person whose Sovereign or State is at war with the U.K. and in relation to civil rights it denotes a person of whatever nationality, including British, who is carrying on a business or is voluntarily resident in the enemy's country or occupied territory.¹⁵ We are not told whether or not a child born to a family, in which the father is involuntarily in the section of the U.K. and Islands then under enemy occupation, is a citizen of the U.K. and colonies. Further, we are not told whether a child born to a British national who is an enemy alien by reason that he is voluntarily living in the enemy state will or will not be a citizen of the U.K. and colonies if that child is born in the section of the U.K. then under enemy occupation. In the circumstances it is not possible to say whether or not such children are patrials or non-patrials.

(ii) If one is a citizen of the U.K. and colonies and is born to or legally adopted¹⁶ by a parent who had that citizenship at the time of the birth or adoption, provided that the parent either then had citizenship of the U.K. and colonies by his birth, adoption, naturalisation or registration in the U.K. or any of the Islands, or had been born to or legally adopted by a parent who at the time of that birth or adoption had such citizenship. This section withholds patriality from people born or legally adopted by a parent who was not, at the time of the birth or adoption, a U.K. citizen by birth, adoption, naturalisation or (subject to the Immigration Act 1971, s.2(2)) registration in the U.K. or the Islands; or if the parent had been born to or legally adopted by a person who, at the time of the birth or adoption was a U.K. citizen by birth, adoption, naturalisation or registration in the U.K. and the Islands.¹⁷ In one case¹⁸ there were two sisters born to a mother who was a citizen of the U.K. and colonies. The mother was born in India in 1921. Her father was also born in India, but her paternal grandfather was born in the U.K. The mother was admitted into the U.K. as a patrial by reason of her paternal grandfather's birth in the U.K., but the two girls, who were born in Kenya and India respectively and were citizens of the U.K. and colonies were, it was held, non-patrials because their mother did not have her U.K. citizenship by her birth, adoption, naturalisation or registration in the U.K. and their maternal grandfather, though he may have been a citizen of the

U.K. and colonies at their mother's birth, did not have that citizenship by virtue of his own birth, adoption, naturalisation or registration in the U.K.

In C. (an infant) v ENTRY CLEARANCE OFFICER, HONG KONG¹⁹ the appellant was an illegitimate girl citizen of the U.K. and colonies, born in Hong Kong. Her mother did not fulfil the above requirements of birth or adoption by a parent who was a U.K. citizen by birth, adoption, naturalisation or registration etc, and accordingly she was not a patrial. The little girl's natural father was born in the U.K. and his parents had been born and married in the U.K. He was, therefore, a patrial. On the facts the Tribunal held that the law did not recognise the natural father of an illegitimate child and for the same reason "grandparents" could not be taken to include the paternal grandparents of an illegitimate child. It is obvious from this case and the former one that patriality is restrictively interpreted and one must fit squarely into the four corners of the law in order to qualify as a patrial. The cases also illustrate that the categories of people who are or are not patrials are far from certain.

Under the Immigration Act 1971, s. 2(1)(a) and (b), if a child is adopted jointly by a citizen of the U.K. born, adopted, naturalised or registered in the U.K., on the one hand, and by an alien married to the British citizen on the other hand, the child may or may not be a patrial. If both joint adoptive parents are citizens of the U.K. and born, adopted, naturalised or registered in the U.K. obviously no problems will arise. However, problems arise immediately:

(a) if one of the adopting joint parents is not born, adopted, naturalised or registered in the U.K. although he or she is a citizen of the U.K. and colonies and

(b) if one of the adopting joint parents is an alien. Such children should be free of immigration control.

(iii) If one is a citizen of the U.K. and colonies who has at any time been settled in the U.K. and Islands and who then had been ordinarily resident there while being such a citizen for the last five years or more.²⁰

In LEVENE v I.R.C.²¹ the Court defined ordinary residence. Viscount Cave L.C. said that ordinary residence:

"connotes residence in a place with some degree of continuity and apart from accidental or temporary absence."²²

If a person goes away for a holiday, therefore, it does not mark a break in the continuity of the ordinary residence. A person may also be ordinarily resident in the U.K. even though he is subject to restrictions on the length of his stay.²³ This follows from the meaning given to the word "settled". In R. v. GOVERNOR OF PENTOVILLE PRISON ex parte AZAM²⁴ Lord Denning M.R. held that:

"special provision was made for people who entered lawfully on a permit for a limited period and overstayed their time...Having entered lawfully their subsequent 'remaining'...did not convert them into illegal entrants. But they were not 'settled'...Such a person was put into a better position than an illegal entrant. He was specially catered for. He was regarded as ordinary resident...though he had remained in breach of immigration laws. He could not be deported on the ground that his presence was ^{not} conducive to the public good. But he could be deported on the ground that he had overstayed his time unless he had been here for five years or more."

It follows, therefore, that a person can be ordinarily resident in the U.K. although subject to the limitations as to the length of his stay.

A person is not to be regarded as free from immigration restrictions where he is exempt from them by virtue of membership of the armed forces or membership of a diplomatic mission.²⁵ Nor, indeed, is a person who is not a patrial to be treated as ordinarily resident in the U.K. or the Islands at a time when he is there in breach of immigration laws.²⁶ In AZAM v HOME SECRETARY²⁷ it was held that the words "when he is there in breach of immigration laws" do not require that there should be subsisting a breach in respect of which sanctions may be imposed, but cover the case of a person whose presence arises from a breach, for example, of any case of illegal entry. It is enough, therefore, that an entry is not in accordance with the Immigration Act and/or the rules made thereunder to constitute a breach.

A citizen of the U.K. and colonies who has been "settled" in the U.K. or the Islands by a period of five years of "ordinary residence" in accordance with the definitions above will be a patrial.

This provision has been restrictive in terms of the East African Asians who, although they were citizens of the U.K. and colonies, could not establish ordinary residence in the U.K. for at least five years. They also suffered from another disability in that most of them could not establish that their parents or grandparents were born, adopted, naturalised or registered in the U.K. or the Islands at the time of their birth or adoption.

It has been held that the alien wife and her children of a person who is 'settled' in the U.K. have no right to enter the U.K. unless she complies with the Immigration Act.²⁸ This is not likely to affect women from Commonwealth countries married to people settled in the U.K. as above.²⁹

(iv) If one is a Commonwealth citizen born to or legally adopted by a parent who, at the time of the birth or adoption had citizenship of the U.K. and colonies by his birth in the U.K. or in any of the Islands.³⁰ It must be noted that the birth or adoption is restricted to Commonwealth citizens only and, unlike s. 2(1)(b) of the Immigration Act ((ii) above) relating to the citizens of the U.K. and colonies born abroad, the Act limits the linkage of a Commonwealth citizen to one parent only and not to that of a grandparent. Under this section, therefore, a Commonwealth citizen is a patrial if his or her parent was at the time of his or her birth or adoption a U.K. citizen by birth in the U.K. or the Islands. Note that if the adopting parent is a U.K. citizen by adoption, naturalisation or registration in the U.K. or the Islands and adopts^{or has} a child by birth who is a Commonwealth citizen then, presumably, that Commonwealth citizen does not become a patrial. This is because the Act says specifically that at the time of birth or adoption of the Commonwealth citizen by a parent, that parent must be a U.K. citizen by birth in the U.K. If the parent adopted or had the Commonwealth citizen by birth before 1949 and the parent was, at that time, a British subject, then the Commonwealth citizen will be a patrial.³¹

It has been submitted that the practical effect of the above provision is to confer patrial status on a Commonwealth citizen whose mother was born in the U.K. or the Islands.³² This result is arrived at because the British Nationality Act 1948, s. 5(1) clearly stipulates that a person shall be a citizen of the U.K. and

colonies by descent if his or her father is a citizen of the U.K. and colonies. This is the concept of the ius sanguinis which is duly recognised by English law³³ and is restricted to the first extra-territorially-born generation only. Patriality requires that the birth of the parent adopting a Commonwealth citizen or to whom the birth of such a Commonwealth citizen has occurred must have taken place in the U.K.

It has been suggested that the provision above compensates for the fact that a married woman does not confer her citizenship upon her child under the British Nationality Acts.³⁴ A child of a U.K. mother who marries an Australian man would be a patrial if the mother retains her U.K. citizenship. The same would not be the case if the woman marries a U.S.A. citizen.³⁵ It is not entirely safe to argue that s. 2(1)(d) of the Immigration Act compensates for the fact that a woman who is a U.K. citizen does not confer citizenship upon her child under the British Nationality Acts. All that can be said is that the effect of s. 2(1)(d) is to confer patriality on Commonwealth citizens one of whose parents was born in the U.K. or the Islands and this is the case under the Immigration Act whether or not Parliament intended to confer U.K. citizenship on them.

(v) The final method of becoming a patrial is if, in the case of women, one is a Commonwealth citizen and either:

(a) is the wife of any such citizen of the U.K. and colonies as is mentioned in s. 2(1)(a), (b) and (c) above or any such Commonwealth citizen as is mentioned in s. 2(1)(d) above, or

(b) has at any time been the wife:

(1) of a person then being such a citizen of the UK and colonies or Commonwealth citizen, or

(2) of a British subject who but for his death would, on the date of commencement of the British Nationality Act 1948, have been such a citizen of the U.K. and colonies as is mentioned in s. 2(1)(a) and (b).

From the above provisions it is obvious that a Commonwealth woman who marries a patrial becomes a patrial automatically or, if before 1949, she married a British subject who but for his death would have become a patrial by virtue of being born, adopted, naturalised or registered in the U.K. or the Islands or by virtue of his parents or grandparents having been born, adopted, naturalised or registered in the U.K. or the Islands. There are, however, two hurdles

to women in this category.

Firstly, s. 2(2) of the Immigration Act makes a proviso that in s. 2(1)(a) and (b) references to registration as a citizen of the U.K. and colonies shall not, in the case of a woman, include registration after the passing of the Immigration Act under or by virtue of the British Nationality Act 1948 unless she is also registered by virtue of her marriage to be a citizen of the U.K. and colonies before the passing of the Immigration Act 1971. The effect of this proviso is that a marriage to a patrial by a Commonwealth woman who is not registered as a citizen of the U.K. and colonies before the Immigration Act 1971 came into force does not confer patriality on the Commonwealth woman automatically. In that case the Secretary of State reserves the discretion to register the woman as a patrial notwithstanding that she is registered as a citizen of the U.K. and colonies by virtue of s. 6(2) of the British Nationality Act 1948 and the registration occurred after the Immigration Act 1971 came into force. The woman will become a patrial automatically, however, if she registered as such a citizen of the U.K. and colonies by virtue of s. 6(2) of the British Nationality Act and the registration occurred before the Immigration Act 1971 came into force.

Secondly, a Commonwealth woman married to a patrial and herself claiming to be a patrial by reason of that relationship is required to prove it by means of such certificate of patriality as may be specified in the immigration rules unless she shows that she is a patrial by reason that:³⁶

(a) she is a citizen of the U.K. and colonies who has at any time been settled in the U.K. and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more, or

(b) she is a Commonwealth citizen born or legally adopted by a parent who at the time of the birth or adoption had citizenship of the U.K. and colonies by birth in the U.K. or in any of the Islands. Unless a Commonwealth woman married to a patrial can show that she belongs to either of the two classes above, then she must produce a certificate of patriality to prove her patriality.

In R. v SECRETARY OF STATE ex parte PHANSOPKAR³⁷ the Court of Appeal heard that the immigration authorities had laid down for themselves a rule of practice that a wife who desired a certificate of patriality

must obtain it in her own country of origin and for that reason they had refused to entertain an application by Mrs. Phansopkar, the wife of a settled patrial, and accordingly required her to return to India and make an application for the certificate to a British representative there. The rules clearly stipulated that the certificate could be obtained from the Home Office in the U.K. or from a British representative overseas. Given these facts the Court held that if such a certificate could be issued either by a British representative or by the Home Office, it followed that an application for it could properly be made to one or the other. The only requirement on such a woman is that she has, not unreasonably, to satisfy the authorities of the fact of her marriage, but having done so, is entitled to the certificate of patriality. The fact that she a Commonwealth citizen married to a patrial entitles her and her children to be patrials and as such have the right of abode in the U.K. on production of the certificate of patriality.

Alien women married to patrials have to obtain visas, if so required, before coming to the U.K. and if they do not do so they will be refused leave to enter. In R. v THE CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT AND ANOTHER³⁸ an alien wife of a settled person was excluded from entry because she did not have a visa.

The above then are the categories of all the citizens of the U.K. and colonies who may enter and leave the U.K. freely. Patriality is, therefore, a very narrow "concept" and is not related to citizenship with regard to the people it leaves out, although they are also citizens of the U.K. and colonies and in that respect it would seem to discriminate unfairly against them. Moreover, as the analysis above reveals, the "concept" of patriality has a lot of gaps and for that reason it is uncertain, inconsistent and highly complex in some cases. A useful general guide of those who may be patrials is found elsewhere.³⁹

Finally, it must be noted that for economic⁴⁰, historical⁴¹ and geographical⁴² reasons the citizens of the Republic of Ireland are, in practice, exempt from immigration control and are, therefore, free to enter and leave the U.K. unlike aliens or commonwealth citizens.

Kenya - Citizenship:

In Kenya a general law was passed in 1906 empowering the colonial government to keep out paupers, lunatics and sick people.⁴⁴ This remained in force until 1944 when the Government used its powers to enact Defence (Admission of Male Persons) Regulations prohibiting the entry of every person, alien or British subject, except by permit. The Regulations ushered into the immigration law of Kenya the entry permit system which has since been followed. In 1949 the first Immigration Act was passed. The immediate effect of the Act was to require every person wishing to come to Kenya to have a permit with the aim of reducing Asian immigration into Kenya.⁴⁵

In 1956 another Immigration Act was passed. Its preamble stated that the future of immigration policy of the Government was to be based on economic considerations and for this reason the Government was to turn to the U.K. for expatriates. The Act created several classes of entry permits and passes which have been carried into the 1967 Immigration Act with the exception that immigrants holding entry permits no longer have the right to reside in Kenya for life.

Therefore entry and stay of immigrants into Kenya is now governed by the 1967 Immigration Act. The point that must be considered now is how an immigrant qualifies to enter Kenya freely. We have seen that in the U.K. one has to be a patrial in order to enter the country freely.

In Kenya s. 4(1) of the Immigration Act 1967⁴⁶ provides that:

"no person who is not a citizen of Kenya shall enter Kenya unless he is in possession of a valid entry permit or pass."

Accordingly, a person is free to enter Kenya and to remain therein as of right only if he is a citizen of Kenya, and if he is not, then his entry and stay in Kenya will be by leave of an immigration officer only.⁴⁷ It is necessary to look at who are citizens of Kenya, therefore, in order to determine those who enjoy the right of free entry and stay in the country.

In framing the provisions of the Constitution of Kenya in connection with citizenship two problems were faced. In the first place, what was to be the position of people living in Kenya or having connections with Kenya at the time of independence? In the

second place, what was to be the position of those people born in Kenya after independence? Each of these two problems is catered for in the Constitution of Kenya 1969⁴⁸ which will be examined now.

In relation to the first category, a distinction was drawn between those who became citizens automatically by the operation of law and those who became citizens by registration. Y.P. Ghai has pointed out, correctly, that this had the effect of

"ascribing different nationalities to different members of the same family."⁴⁹

Those who became citizens automatically by the operation of law were:

(i) all those people who were born in Kenya and who were on the 11th of December 1963 citizens of the U.K. and colonies or British Protected people. They became citizens automatically on that date if, and only if, at least one of their parents was born in Kenya.⁵⁰ This group included almost all the indigenous people and a good percentage of immigrant communities.

(ii) all those people who although they were born outside Kenya were on 11th December 1963 citizens of the U.K. and colonies or British Protected persons if the father of the person became or would but for his death have become a citizen of Kenya by virtue of (i) above on 11th December 1963.⁵¹ In other words, if the father and at least one of the grandparents were born in Kenya before 11th December 1963 then the person became a Kenyan citizen automatically notwithstanding that he himself was born outside Kenya provided that he was a citizen of the U.K. and colonies or a British Protected person.

The rest of the people having connections with Kenya became citizens by registration as follows:

(i) if they were born in Kenya, but neither of their parents nor their grandparents was so born and on 11th December 1963 they were citizens of the U.K. and colonies or British Protected people then they were entitled upon application before 12th December 1965 to be registered as Kenyan citizens as of right.⁵² But a person (other than a woman who is or has been married) who was below the age of 21 years had to have an application for registration as a citizen made by the parent(s) or guardian(s).

(ii) if they were citizens of the U.K. and colonies on 11th December 1963, having become such citizens:

(a) under the British Nationality Act 1948 by virtue of their having been naturalised in Kenya as British subjects before the Act came into force, or

(b) by virtue of having been naturalised in Kenya under that Act, then they were entitled upon application before 12th December 1965 to be registered as citizens of Kenya as of right.⁵³

(iii) any woman who on 11th December 1963 was or had been married to a person who became a citizen of Kenya automatically by operation of law or would have so become a citizen of Kenya but for his death was entitled upon application to be registered as a citizen of Kenya.⁵⁴ It must be noted at once that there is no time bar as to the date of application and accordingly women once married to men who became or would have become Kenyan citizens automatically by the operation of law are still free to apply to be registered as citizens of Kenya. This is perhaps a reflection of the weight attached to the preservation of families of men who would have become citizens automatically. The position of their wives is very secure indeed. There is no time limit on their right to apply for Kenyan citizenship.

Any woman who on 11th December 1963 was married to a person who became or would have, but for his death, become entitled to be registered as a citizen of Kenya by virtue of paragraph (i) and (ii) above, but whose marriage was terminated by death or dissolution before 12th December 1963, or was so terminated on or after 12th December 1963 but before that person exercised his right to be registered as a citizen of Kenya under either of the paragraphs, was entitled upon application before 12th December 1965 to be registered as a citizen of Kenya.⁵⁵ There is a provision made for any woman whose marriage was dissolved before 12th December 1965 before the husband exercised his right to be registered as a citizen of Kenya, to apply to be registered at any time after the deadline date of 1965. She must, however, apply for such citizenship during the lifetime of the husband.⁵⁶ It is amply implied by the Kenya Citizenship Act⁵⁷ that if the woman re-marries during the lifetime of her former husband or her former marriage then the right to register as a Kenyan citizen lapses automatically. However, if the husband of the former

marriage re-married that right does not lapse if she, herself, remains unmarried.

(iv) In Kenya there is an additional category of people who could register as Kenyan citizens. These are people who on 11th December 1963 were citizens of the U.K. and colonies or of the Republic Of Ireland and who were ordinarily and lawfully resident in Kenya (otherwise than by a pass issued under the Immigration Act of 1956⁵⁸ as then in force and conferring on them the right to remain in Kenya temporarily). On application they were entitled to be registered as citizens of Kenya as of right.⁵⁹ If the person (other than a woman who is or has been married) was under the age of 21 years then the parents or guardians applied on his behalf. The constitutional provision is silent on the registration of wives of people who qualified for registration as citizens under this head, but died or had their marriages dissolved before their husbands could exercise their right to be registered as citizens. It appears that the wives of these people who qualified or could qualify are deliberately left out and that being so they are not entitled to free entry and stay in Kenya under the 1967 Immigration Act. Provision should have been made for them to be registered as citizens.

A person who is registered as a Kenyan citizen must renounce his other nationalities and take an oath of allegiance whereas a person who becomes a citizen automatically is only required to renounce his other nationalities. A person who cannot renounce his nationalities by reason that his former country's law does not make provision for renunciation of citizenship is merely required to make an appropriate declaration concerning his former nationalities.⁶⁰

As is clear from the above, most of the people who are required to apply for registration as citizens of Kenya had until 12th December 1965 to apply for the registration. By 1964 only 3,911 Asians and Europeans had registered as citizens.⁶¹ Midway through the second year the number had risen to 9,018 out of which there were 8,174 Asians and 844 Europeans.⁶² During the closing months of November and December 1965 there was an upsurge of applications totalling more than 10,000 in number.⁶³

All that the law required of the people was no more than sending in application forms for registration. If they did that they were entitled by the constitution to be registered as citizens

as of right. It is now a matter of historical importance to note that many of the applications took years to process. As late as September 1970 the Vice President, Mr. D. Arap Moi, declared that the granting and processing of citizenship applications had been halted while a review of citizenship policy was taking place.⁶⁴ This declaration followed allegations of corruption which was generated by the fact that those who applied for registration and did not get it soon were employing all methods available to them to have their applications processed. Their status in immigration law will be looked at below.

(v) Finally, provision is made by the Citizenship Act⁶⁵ for registration as Kenya citizens of all those people of African descent⁶⁶ who were not indigenous inhabitants of Kenya. On satisfying specified conditions⁶⁷ and making a declaration in writing of their willingness to renounce other nationalities and taking an oath of allegiance they may be registered as Kenyan citizens. There is no time bar in their case.

Under the independence constitution, special protection was given to people who were non-citizens but who were ordinarily and lawfully resident in Kenya. They were free to remain in Kenya for life.⁶⁸ The provision protected the immigrants if they did not want to become citizens of Kenya. In 1965 the provision was amended⁶⁹ and the people were brought under the rigours of immigration law. Under the 1956 Immigration Act⁷⁰ they had been entitled to claim a residents certificate with the right to stay in Kenya for life.⁷¹ A person with a residents certificate was free to come and stay in Kenya and engage in any business, trade or profession, or to engage in employment without the necessity of requiring leave from immigration authorities. However, the 1967 Immigration Act changed this position substantially.

Section 18(1) of that Act provides that subject to s. 19 of the Act any residents certificate granted or issued or deemed to be issued or granted under the 1956 Immigration Act shall have effect according to its term as if it had been issued under the 1967 Act. This provision, in effect, gave the immigration authorities power to withdraw residents certificates already held or deemed to be held.⁷²

Section 19 of the Act provides the method by which residents certificates are brought to an end. It provides that the

Minister may at any time require any person or class of persons whose presence in Kenya would have been unlawful but for s. 18(1) to apply to an immigration officer in the prescribed manner for an entry permit or pass. The Minister so requires the residents certificate holders to apply for entry permits or passes by notice in the Gazette. After the expiration of three months from the date of the notice in the Gazette, s. 18 above then ceases to have any effect, that is, the residents certificates become void and of no effect. The further stay or entry of a person whose resident certificate becomes void in the above manner must be on the basis of his or her entry permit or pass. In other words the person now qualifies for entry or stay in Kenya under the immigration law to which he or she is now fully subjected. However, if a residents certificate has not been "called up" then its holder is still free to enter and remain in Kenya free of immigration law and his position is like that of a Kenyan citizen in relation to immigration control.

In the preceding paragraphs an examination was made of the mode of acquiring citizenship on and after independence. All the people who became citizens of Kenya under any of the above paragraphs or who held or were deemed to hold residents certificates are free to enter and remain in Kenya without being subject to immigration. It now remains to examine the mode of acquiring citizenship after independence which also puts a person beyond the reach of immigration law.

(i) A person born in Kenya after 11th December 1963 becomes a citizen of Kenya automatically by the operation of law unless:

(a) neither of his parents is a citizen of Kenya and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Kenya, and

(b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under enemy occupation by that country.⁷³ Subsection (a) appears to discriminate against women in that a woman possessing such immunity from suit and legal process and who is married to a Kenyan citizen will not confer her nationality on their child if it is born in Kenya since the child will become a Kenyan citizen automatically. This is

not clearly the case if the couple give birth to a child in Kenya and the man is the one possessing the immunity from suit and legal process while the woman is a Kenyan citizen. It is irrelevant that the child was born in Kenya. Many countries practise this kind of discrimination which seems to be based solely on sex.

Sub-section (b), unlike its U.K. counterpart, is clear and precise and avoids the use of vague terms like "enemy aliens" which appears commonly in the U.K. law. A child is a Kenyan citizen, therefore, if he or she is born in any part of Kenya, unless the father is a citizen of a country with which Kenya is at war and notwithstanding that the birth of the child occurs in an area of Kenya then under enemy occupation. This has never happened under the U.K. law though. Further, the presence of the parents in an enemy occupied area whether voluntary or involuntary has no effect on the citizenship of the child born there provided the father is not a citizen of the country engaged in war with Kenya. This again is not the case in the U.K. as that law takes into account whether the parents were in the enemy occupied area voluntarily or involuntarily.

Sub-section (b) has two other effects. Firstly, a child born in an area of Kenya not under enemy occupation and whose father is a citizen of the country with which Kenya is at war will be a citizen of Kenya automatically notwithstanding that the father is himself engaged in the war against Kenya. Secondly, the child will be a citizen of Kenya whether it is born in an enemy occupied area of Kenya or not notwithstanding that his parents, ~~who~~ although Kenyan citizens, are nevertheless engaging in war against Kenya on the side of the enemy.

Children become automatic citizens of Kenya by virtue of their birth in Kenya in any of the above situations and they are automatically free to enter and remain in Kenya without being subject to immigration law.⁷⁴

The Kenyan law is more generous than the U.K. law in one more respect. A child will be a citizen if born to a woman whether or not out of wedlock and in an enemy occupied area. The U.K. law is more rigid in that it must be shown that the child would be stateless.

A child born in Kenya who becomes a citizen of Kenya in the

above situations and who is at the same time a citizen of some other country will automatically cease to be a citizen of Kenya unless upon attaining the age of 21 he renounces the citizenship of that other country and takes an oath of allegiance.⁷⁵ If he so ceases to be a citizen of Kenya then he is automatically made subject to the immigration law with the consequence that the right to enter and remain in Kenya without being subject to immigration law lapses.

(ii) A person also becomes a citizen of Kenya if he is born after the 11th of December 1963 and his father was a citizen of Kenya at the date of his birth. This provision is intended for children born outside Kenya and whose fathers are Kenyan citizens.⁷⁶ This provision discriminates against women in spite of the existence of a further provision that a person who is a citizen of Kenya does not lose the citizenship by reason of voluntary acquisition of another country's citizenship through marriage.⁷⁷ However, such children are free to enter and remain in Kenya without being subject to immigration law unless at the age of 21 years they fail to renounce any other citizenship they may have, in which case they lose their Kenyan citizenship automatically and become subject to immigration law. They must take an oath of allegiance on the renunciation of other citizenships.⁷⁸

Under s. 2 of the Adoption Act of Kenya (Cap. 143) a father, in relation to an illegitimate child, means the natural father. Since the term 'father' is not defined in the Constitution it is arguable that an illegitimate child born outside Kenya of a Kenyan father will automatically become a Kenyan citizen. This matter has never been decided in Kenyan Courts, but should it arise, the Kenyan Courts might take the English Courts' attitude enunciated in Re M (an infant) (1955) 2 All E.R. 911 that the law does not recognise the natural father of an illegitimate child, but only the father of a legitimate child born in wedlock. If the Kenyan Courts held otherwise then the child, although illegitimate, will be free to enter and remain in Kenya without being subject to immigration law unless the child fails to renounce the citizenship of that other country on attaining the age of 21 or fails to take the oath of allegiance on the renunciation of the citizenship of that other country.

(iii) A woman who has been married to a citizen of Kenya shall be entitled, upon making application, to be registered as a citizen of Kenya.⁷⁹ This provision is less complicated than its U.K. counterpart in that it does not make distinctions between citizens strictly so called, Commonwealth citizens and aliens in matters relating to the entry and stay of women in Kenya as the U.K. Immigration Act 1971 does. It may, however, be criticised, like the U.K. Immigration Act 1971, for requiring the women ~~to be~~ married to citizens to have to register before they are allowed even the most limited freedom of entry and stay in the country. Therefore, until a woman married to a Kenyan citizen has been registered as a citizen of Kenya she is subject to immigration law no matter how long she remains in the country.

(iv) A Commonwealth citizen or a citizen of a specified African country⁸⁰ who has been ordinarily resident in Kenya for a specified period, whether commencing before or after December 12th 1963, shall be eligible, upon application, to be registered as a Kenyan citizen.⁸¹ To be ordinarily resident means that one has stayed in Kenya with a degree of continuity apart from accidental or temporary absence.⁸² The distinction that one must have entered into the country lawfully before he can be regarded resident, notwithstanding that he thereafter stays in breach of immigration law, has not been made in Kenya as it has in the U.K.

A person who has been ordinarily resident in Kenya for a period of 5 years immediately preceding the date of his application for registration is eligible to be registered as a citizen of Kenya.⁸³ A person who holds an entry permit under the 1967 Immigration Act and has been ordinarily resident in Kenya by reason of that entry permit for 5 years or more is eligible to apply for registration as a citizen of Kenya.

What is not clear is whether or not a person who entered lawfully, but thereafter remains in the country in breach of immigration law is eligible to apply for registration as a citizen. In the U.K. there is no doubt that such a person will be ordinarily resident and will probably become a patrial by settlement after 5 years, notwithstanding that he is a "Commonwealth citizen" or an "alien".

(v) A person shall be eligible to become a Kenyan citizen by registration if at the date of his application for the citizenship one of his parents is a citizen of Kenya.⁸⁴ If he has not

attained the age of 21 (except for a woman who is married or has been married) then the parents or guardians must apply on his or her behalf.

The effect of this provision is that it confers citizenship rights through the maternal lineage if the child is born outside Kenya after 12th December 1963. Provided that at the time of birth the mother is still a Kenyan citizen, it is irrelevant for the purpose of this section that the child was born legitimate or illegitimate.⁸⁵ The Kenya Citizenship Act also makes provision for the renunciation of any citizenship of such children and the taking of the oath of allegiance when they attain the age of 21 years.⁸⁶

Before the child becomes a citizen it is, of course, subject to immigration law as it will be on failing to renounce other citizenships, if any, on attaining the age of 21 years. In the U.K. the child, whether legitimate or not, born outside the U.K. to a woman who is a patrial is entitled to the right of abode as of right. It follows that the U.K. has relaxed its laws in this area more than Kenya, although the right of such a child to become a citizen of the U.K. is just as narrow as Kenya, if not narrower.

(vi) The final method of becoming a Kenyan citizen after 12th December 1963 is by naturalisation. It is provided that any person who:

- (a) has attained the age of 21 years,
- (b) has been ordinarily and lawfully resident in Kenya for a period of 12 months immediately preceding his application,
- (c) has been ordinarily and lawfully resident in Kenya for a period or for periods amounting in aggregate to not less than 4 years in the 7 years immediately preceding the said 12 months,
- (d) satisfies the Minister that he is of good character,
- (e) satisfies the Minister that he has an adequate knowledge of the Swahili language and
- (f) satisfies the Minister that he intends, if naturalised as a citizen of Kenya, to continue to reside in Kenya will, on application, be eligible to be naturalised as a citizen of Kenya.⁸⁷ If he has become a citizen by naturalisation before members of his family become citizens then it appears that in order for them

to become citizens of Kenya they have to be registered as such, and not naturalised on application. In that case, the wife falls under head (iii) above and will be entitled to be registered as a citizen as of right.⁸⁸ If, however, she applies together with the husband for citizenship, then it appears she will become eligible to be naturalised as such. This is the case also with indigenous people of non-specified African countries.⁸⁹

It is important to note that there is no time limit for registration after independence in the case of those who have to be naturalised, whether or not they were in Kenya before, on or after 12th December 1963. Moreover, in terms of the periods of residence, it is easier to become a citizen by naturalisation than by registration. This is the opposite in the U.K., but to become a patriot by settlement the period of residence is the same for aliens and Commonwealth citizens.

The above categories of people are free to enter and stay in Kenya without being subject to immigration law. However, two problems arise; firstly, with those who are entitled to be registered as citizens of Kenya on application and have not been so registered, although in fact they have applied; and, secondly, with those people who are adopted. These two problems will be examined in turn.

In connection with those people who are entitled to be registered as citizens, but have not been told anything since they applied, the question to ask is whether or not they are free of immigration law. There is no question that the official policy is that if an application for citizenship has not been finalised the person retains his original citizenship. This would probably be the case under international law since a stateless person is reckoned to have, ultimately, the protection of the country of which he was a citizen last. During the Uganda Asian exodus, Britain clearly accepted responsibility for the Asians whose applications for citizenship had not been finalised or properly processed. However, to leave the matter here would be to leave out the scale and the complexity of the problem.

In June 1967 of more than 10,000 applications for citizenship by people who were entitled to become citizens only 500 had been processed.⁹⁰ The processing was clearly very slow and even

today there are people who have not heard anything about their applications. They live in much anxiety day and night. What was their entitlement to citizenship worth then?

The Kenyan Citizenship Act provides that the Minister shall not be required to assign any reason for the grant or refusal of any application for registration as a citizen and his decision shall not be subject to appeal or review in any Court.⁹¹ The effect of this provision is clearly that the Minister has an absolute discretion that is not questionable, and has never been questioned, to grant or refuse an application for the registration of any person as a citizen. But if he refuses to register a person so entitled then he is clearly acting in breach of the mandatory terms of the Constitution. In MADHWA v CITY COUNCIL OF NAIROBI⁹² one of the issues that arose was whether or not Asians who were citizens of the U.K. and colonies before 11th December 1963 and had applied to be registered as Kenyan citizens prior to the deadline of 12th December 1965 under s. 2(1) of the independence Constitution were citizens of Kenya since they were entitled to be so registered under the Constitution. The Court did not find it necessary to decide this point, but noted obiter that if the suit had been:

"instituted by the Government (not the City Council of Nairobi) against persons of the plaintiffs and depending for its success upon the fact that they had not yet obtained certificates of registration as citizens it might be a defence in the nature of some form of estoppel, based upon the provisions of s. 2(1) and the delay which has occurred in dealing with a possibility of success."⁹³

It is regrettable that the Court did not make specific findings on this very important issue. However, what it said is important, for it appears from it that if the Government wants any person who applied for citizenship, and that person was entitled to be registered as such, to take an entry permit or a pass and thus be subjected to immigration law, then that person can rely on the grounds the Court stated when refusing to comply with the requirement to take up an entry permit or pass.

As far as the Government practice is concerned, however, all such people have to have entry permits and/or passes or residents certificates if they had one previously and it has not been called up. They are therefore subject to immigration law in practice.

Coming to the second problem, the Constitution is totally silent on the citizenship status of adopted children. Obviously, before they become citizens of Kenya they are subject to immigration control. This is different from the U.K. in that in the U.K. a child who is adopted in the U.K. by a patrial automatically becomes a patrial. In Kenya it is possible that an adopted child is eligible to become a citizen by registration on application being made under s. 92(2) of the Constitution of Kenya examined in (v) above. If that is so then an adopted child may apply to become a citizen by registration whether the adopter is a male or a female person and whether the adoption takes place outside or inside Kenya.

In Kenya it is necessary that at the time of adoption one of the parents must have been Kenyan citizens. The Constitution does not define "parent" and so we are forced to look to the Adoption Act.⁹⁴ In that Act, the word "parent" is defined thus:

"(it) does not include the natural father of an illegitimate infant."⁹⁵

However, "father" in relation to an illegitimate child means the natural father.⁹⁶ The clear effect of these definitions is that an adopter is, under the Adoption Act, a parent. This definition must be construed as necessarily applying to s. 92(2) of the Constitution. If that is so, and it is so submitted, then it follows that, whether an infant is adopted inside or outside Kenya will not be a hindrance to his or her being registered as a citizen of Kenya. Although the Adoption Act says that no adoption order shall be made unless the applicant and the infant reside in Kenya⁹⁷ it does not mean that the Act does not recognise adoptions made outside Kenya; there are specific provisions made in s. 21 of the Act for adoptions made outside Kenya by competent Courts of law of that country. It follows, therefore, that infants adopted in Kenya or outside Kenya are eligible to be registered as citizens on application and once they are so registered they are automatically removed from the rigours of immigration law. If the child wishes, he or she can apply for naturalisation as a citizen of Kenya, but in that instance he or she must be over 21 years old and comply with the requirements enumerated under head (vi) above.⁹⁸ The contrast with the U.K. is all the more glaring in that a child adopted by U.K. parents outside the U.K. and Islands does not qualify as a patrial, and like children adopted

who have not become citizens, in the case of Kenya, they are subject to immigration control.⁹⁹

In a case based on the 1956 Immigration Act of Kenya¹⁰⁰ reference was made to the effect that a person who is Hindu by religion cannot be permitted under immigration law to adopt children other than by the methods and to the extent allowed by his religion. This clearly is the case still and the Constitution itself leaves it open to the immigration officers to refuse entry to or leave to stay in Kenya to children adopted contrary to the Hindu teachings if the adoption was by a Hindu person unless the adoption was carried out in accordance with any other written law.¹⁰¹ This is clearly the case in the U.K. where an adoption by a Hindu will not be recognised unless it has been carried in accordance with the law.¹⁰² In Kenya, the Minister has a free hand to refuse registration or naturalisation of a child adopted by a Hindu in contravention of their religious teachings or any other superior law.¹⁰³

The undesirable consequence of the case above is that Hindus are barred from adopting more children than their religious teachings allow, whereas other people whose personal laws place no limit on the number of children they may adopt are entirely free to adopt as many children as they like.

In summary, the citizens of Kenya are entirely free of immigration law as are patrials in the case of the U.K. The categories of people who may enter into Kenya free of immigration law and remain therein freely are clearcut in comparison to the patrials who may enter the U.K. This may well be due to the imperial legacies of the U.K. In both countries there are people who have been made to suffer hardships unnecessarily due to the policies of each country. In Kenya these people are those who applied for citizenship and who were entitled to be registered as such, but have never heard anything further for a long time. Before they are finally registered they are, in effect, stateless and are subjected to immigration in an apparent contravention of a constitutional protection. In the U.K. the categories of people who suffer from the gaps in the law relating to patrials are many and some of them are even unknown. They include young Asians dodging Rhodesian draft laws, the E. African Asians holding British passports and those citizens of the U.K. and colonies who happen, through an accident of nature, to be born outside the U.K. or the Islands or who are registered, naturalised

or adopted outside the U.K. and in all cases have no or had no parent(s) or grandparent(s) born, registered, naturalised or adopted in the U.K. or the Islands.

It is submitted that it is not only logical, but also constitutionally and in accordance with the U.N. Declaration on Human Rights that immigration laws should be related to citizenship laws and must not be operated so harshly as they have been in both Kenya and the U.K.

FOOTNOTES
(Chapter 1(i))

1. Immigration Act 1971, s. 3(5)(b). The cases in which deportation is justified on grounds of being conducive to the public good are likely to be few: H.C. 80(1973) and H.C. 82(1973) para. 43.
2. Immigration Act 1971, s. 4(3); H.C. 81(1973) para. 56 and H.C. 82(1973) para. 29.
3. Immigration Act 1971, s. 33(5). In SCHMIDT v HOME SECRETARY [1969] 3 All E.R. 795 the Lord Chief Justice said that when an alien, approaching the country, is refused leave to land he has no right capable of being infringed - his desire to land can be rejected for good reason or for bad, for sensible reason or for fanciful or for no reason at all. The prerogative powers are therefore complete, absolute and drastic.
4. R. Moore and T. Wallace p. 10.
5. I. Macdonald p. 24.
6. British Nationality Act 1948, s. 2.
7. Ibid.
8. British Nationality Act 1965, s. 1.
9. The Immigration Act 1971, s. 1(1).
10. Ibid. s. 2(1)(a). The Islands means the Channel Islands and the Isle of Man; ibid. s. 33(1).
11. The British Nationality Act 1948, s. 4(a); I. Macdonald p. 25.
12. British Nationality Act 1948, s. 4(b).
13. British Nationality Act (No. 2) 1964, s. 2(2).

14. British Nationality Act 1948, s. 4(b). proviso.
15. Halsbury's Laws of England, 4th edition, vol. 4, para. 950.
16. For the definition see Immigration Act 1971, s. 33(1).
17. Immigration Act 1971, ss. 2(1)(b) and 2(3)(b).
18. HUSSEIN AND ANOTHER v HOME SECRETARY [1975] Imm. A.R. 69.
19. [1976] Imm. A.R. 165.
20. Immigration Act 1971, s. 2(1)(c).
21. [1928] A.C. 217.
22. Ibid., p. 225. An absence of 20 months breaks the period of ordinary residence - R.V.HUSSAIN, The Times, November 13, 1971.
23. R. v. GOVERNOR OF PENTONVILLE PRISON [1973] 2 All E.R. 741.
24. Ibid.
25. Immigration Act 1971, s. 8(5).
26. Ibid. s. 33(2).
27. [1973] 2 All E.R. 765.
28. R. v. CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT, The Times, May 12, 1976 C.A.
29. Immigration Act 1971, s. 1(5).
30. Ibid. s. 2(1)(d).
31. Ibid. s. 2(3)(c).

32. I. Macdonald p. 35.
33. Ibid. p. 25.
34. J.M. Evans p. 36.
35. Ibid.
36. Immigration Act 1971, s. 3(9).
37. [1976] QBD 606.
38. The Times, May 12, 1976 C.A.
39. I. Macdonald p. 32.
40. The migration of Irish workers to the U.K. is of great economic importance to the latter.
41. The Republic of Ireland was ^{associated with the U.K. for long} ~~a member of the Commonwealth~~ and there are a number of Southern Irish Loyalists who are British subjects.
42. The frontier with Ireland of over 300 miles would be difficult to patrol.
43. Citizens of the Republic of Ireland who are not British subjects are now aliens and subject to deportation like aliens.
44. B. Ogot p. 189.
45. Ibid.
46. Act No. 25 of 1967.
47. This is not necessarily the case in the U.K. because patriality is not co-extensive with citizenship.

48. Act No. 5 of 1969.
49. Y.P. Ghai, E.A.L.J. (1967) vol. 3 p. 197.
50. Kenya Constitution, 1969, s. 87(1).
51. Ibid. s. 87(2).
52. Ibid. s. 88(1).
53. Ibid. s. 88(5)(a) and (b).
54. Ibid. s. 88(2)(a) and (b).
55. Ibid. s. 88(3).
56. Citizenship Act, s. 16(1).
57. Ibid.
58. Ibid.
59. Kenya Constitution 1969, s. 88(4).
60. Citizenship Act, s. 11.
61. D. Rothchild p. 188.
62. Ibid.
63. Ibid.
64. D. Rothchild p. 189.
65. Ibid.
66. The Citizenship Act, s. 3.

67. Ibid.
68. Independence Constitution, s. 25(3)(d).
69. Act No. 14 of 1965.
70. Immigration Ordinance 1956.
71. Ibid. s. 6(1) and (7) schedule 1 para. 1.
72. Immigration Act 1967, s. 18(2).
73. Kenya Constitution 1969, s. 89(9).
74. The President has power to control the movements of people in North Eastern Province and contiguous districts. The power is more like that of detention and it does not affect the rights of citizenship of those born there or their rights of entry into Kenya. Preservation of Public Security Act cap. 57; Kenya Constitution 1969, s. 127.
75. Kenya constitution 1969, s. 97(1).
76. Ibid. s. 90.
77. Ibid. s. 97(3).
78. Ibid. s. 97(1).
79. Ibid. s. 91.
80. The countries are normally published in the Kenya Gazette: they will have agreed with Kenya to mutually take each other's citizens as citizens of their own by registration. The Kenya Constitution 1969, s. 92(3).
81. Kenya Constitution 1969, s. 92(1).

82. K. PYARI v. S. SINGH (1964) E.A. 278 at p. 279.
83. Citizenship Act s. 17(a).
84. Kenya Constitution 1969, s. 92(2).
85. A child born outside Kenya whose father is a citizen of Kenya automatically becomes a citizen of Kenya.
86. Citizenship Act, ss. 4 and 5.
87. Kenya Constitution 1969, s. 93.
88. Ibid. s. 91 - note the use of the term 'entitled' as opposed to 'being eligible'.
89. Non-Gazetted African countries.
90. D. Rothchild p. 188.
91. Citizenship Act, s. 9.
92. [1968] E.A. 406.
93. Ibid. p. 409.
94. Act No. 2 of 1958 (Rev. 1962).
95. Ibid. s. 2.
96. Ibid.
97. Ibid. s. 4(5).
98. Kenya Constitution 1969 s. 92(2).
99. PATEL v ATTORNEY-GENERAL [1960] E.A. 388 and ATTORNEY-GENERAL v NARAIN PUNJA [1961] E.A. 652.

100. PATEL v ATTORNEY-GENERAL [1960] E.A. 388.

101. Adoption Act, s. 21.

102. B. SINGH v ENTRY CLEARANCE OFFICER, NEW DELHI [1975] Imm. A.R.
34.

103. Kenya Constitution, s. 82(1).

(ii) Immigration Rules and Regulations

In both the United Kingdom and Kenya immigration officers act in accordance with instructions issued to them by the Secretary of State or the Minister respectively. In the U.K. Article 30(2) of the Aliens Order 1953 required immigration officers to act in accordance with the instructions. The instructions were general rules, which were set out in "General Instructions", a loose-leaved volume of about 400 pages which was under constant revision. The instructions were not made public and they were always supplemented by further rules of a temporary or local application. In addition, special instructions were often issued about individuals, for example, persons who had previously been deported or international criminals.

When the Commonwealth Immigrants Act 1962 was passed the U.K. Government decided, on the insistence of Parliament embodied in s. 3(5) of the Act, to publish for the first time the Secretary of State's instructions to immigration officers. The publication of these instructions gave them a unique and new meaning in that they not only became law in effect, but also were drafted in such a way as to be flexible and easily changeable. The present Rules are descendent from the 1962 ones, therefore.

In Kenya, the Immigration Act of 1956 (s. 3(4)) gave the Minister power to issue general or special directions to be followed by immigration officers when acting in pursuance of their powers under the Act. These instructions were not published. The 1967 Immigration Act (s. 10(2)) stipulates that immigration officers will exercise their functions in accordance with the Minister's instructions. Some of these instructions are not published, but some are published as Regulations. It is the latter that will be examined.

(A) Rules (U.K.)

The current rules that form the subject of discussion under this head are:

- (a) Commonwealth Citizens : Control on Entry H.C. 79 (1973);
- (b) Commonwealth Citizens : Control after Entry H.C. 81 (1973);
- (c) E.E.C. and Non-Commonwealth : Control on Entry H.C. 80 (1973) and,

(d) E.E.C. and Non-Commonwealth Citizens : Control after Entry H.C. 82 (1973)

There are also a series of amendments.¹ As is evident from above there are separate rules for Commonwealth citizens and aliens.² They derive their existence from s. 3(2) of the Immigration Act which provides, as far as is relevant:

"S. 3(2): The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules or of any changes in the rules, laid down by him as to the practice to be followed in the administration of the Act for regulating the entry of persons required under this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances..."

Further, s. 3(1) provides:

"Except as otherwise provided by this Act, where a person is not a patrial:

- (a) he shall not enter the U.K. unless given leave to do so in accordance with this Act;
- (b) he may be given leave to enter the U.K. (or when already there, leave to remain in the U.K.) either for a limited or for an indefinite period;
- (c) if he is given a limited leave to enter or remain in the U.K. it may be given subject to such conditions restricting his employment or occupation in the U.K. or requiring him to register with the police or both."

Read together the two sections reveal that Immigration Rules are made for the control of aliens and Commonwealth citizens not having a right of abode in the U.K.; (that is non-patrials) both before and after entry into the U.K. The scope of these rules is not all embracing for s. 1(5) of the Act states that:

"The rules shall be so framed that Commonwealth citizens settled in the U.K. at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the U.K. than if this Act had not been passed."

The rules express immigration policies to some extent apart from the fact that they are largely procedural in their nature and cover anything from obtaining an entry clearance to deportation.

They cover every range of activity that a non-patrial may do before and after entering the U.K.³ As such they are by far the single most important handle on the "immigration wheel" and the main handbook for immigration officials.

Because these rules form such an important part of immigration law it is imperative that their scope must be very clear. As it is some doubt as to their application has been expressed because they, allegedly, give officials almost carte blanche to act as they will in nearly any situation. Richard Plender says that:

"the rules are open to criticism on the ground that they represent an unwarranted delegation of legislative power. Their unique status presents problems of interpretation and application. Their terminology is sometimes vague; their structure complicates and does not simplify the law. They are (also) silent on important areas..."⁴

Macdonald also says that:

"the rules do not incorporate all that needs to be known. First of all, they give no indication of the full policy on immigration...Secondly, the operation of immigration controls over a very long period for aliens and over the last ten years for Commonwealth citizens has inevitably led to the development of certain administrative experience and practices within the immigration section of the Home Office. Even those dealing daily with immigration cases are unable fully to fathom...these practices. So much depends on the exercise of someone's discretion, either at an airport or within the Home Office itself. The immigration rules (therefore) spell out in the most general terms what these discretions are. People are still liable to be turned back at a port or airport for the most bewildering variety of reasons, when so far as they are concerned they have complied with all the rules."⁵

All these criticisms are indeed true. They underline the marked looseness of the scope of the Rules. For example, in a case already cited of R. v SECRETARY OF STATE EX PARTE PHANSOPKAR⁶ the Court of Appeal vehemently condemned the practice of the Home Office requiring a Commonwealth citizen married to a patrial man to obtain her certificate of patriality in the country of her origin when in law she was entitled to get it in the U.K. as well. Here is a lady who had done all she was supposed to do under the Rules and yet when



she wanted a certificate of patriality she was told by the Home Office to go back to India and get her certificate there. This would have involved her, as the Court noted, in an arduous process of waiting exceeding 18 months. The Court rightly rejected this and condemned it. This is just an instance illustrating an hitherto undiscovered and hardly discoverable rule of practice intimately related to and applied under the umbrella of the Rules.

Robert Moore also argues that the Rules:

"have political functions derived from the way in which (they) are put into use by officials exercising discretion and by the hidden implications of the Rules themselves. One clear example of the Rules embodying principles not actually found in the legislation and therefore not debated...is that anyone convicted of an extraditable offence should be refused to enter."⁷

These Rules are, by and large, arbitrary; by reason of being subject to negative checks, have little, if any, Parliamentary supervision or control and are also vague. They leave unbridled discretion to the immigration officers and the Secretary of State. Some of the powers are, as will be seen later, illegal or of questionable legality. It is, therefore, not surprising that it is the Rules that have been the subject of a vast amount of litigation under the Immigration Act.⁹ J.M. Evans has complained that in matters connected with deportation the Rules:

"give no clear guide to the Government policy."¹⁰

Apart from the fact that the Rules apply to non patrials both before and after entry it is not otherwise clear what their content is.¹¹ This is largely because there are no clearcut and open policy guidelines. According to Professor K.C. Davis there are seven essential things for "structuring"¹² discretionary powers¹³ such as are given under the immigration Rules. These are:

"open plans, open rules, open policy, open statements, open reasons, open precedents, and fair and informal procedures. Openness is a natural enemy of arbitrariness and a natural ally in the fight against injustice. When plans and policies are kept secret (as they are under the U.K. immigration Rules)...private parties are prevented from checking arbitrary or unintended departures from the rules."¹⁴

It is submitted, therefore, that if a clearcut open policy

is pursued we shall start to witness a system of immigration Rules that are structured and thoroughly well checked. Their scope will be certain and clear. It is highly undesirable to have Rules that make for no certainty of action or procedure to be followed in any given situation. Such rules will often be executed according to the whim or caprice of the administration when and if it suits them.

In certain cases involving fundamental rights the Rules do not provide any protection at all. For example, a passenger arriving at Heathrow Airport can be refused leave to enter or simply put into detention as an immigration officer chooses. Yet, it is known that freedom of movement is a fundamental right. It is particularly disturbing since the courts have held that 'habeas corpus' is not available to a person who is refused entry because ~~he has not landed, technically, in the U.K. and because~~ "detention without a charge is not unlawful".¹⁵ This would be the case also where a person enters into the U.K. illegally. He can be arrested and detained without having recourse to the protection of 'habeas corpus' for as long as he cannot prove, prima facie, that his detention is illegal.¹⁶

(B) Regulations (Kenya)

The Regulations made under the 1967 Immigration Act have a statutory force of law because it is delegated legislation. The Minister's power to make regulations is limited by the Act to specific things.¹⁷ He has power, however, to prescribe penalties for offences committed in respect of the regulations.¹⁸

The most noticeable thing about the provisions is that the Minister can make regulations almost with the same ease as the U.K. Secretary of State. Most of the regulations made by the Minister are now contained in Legal Notice No. 235 of 1967 and other subsequent ones. They are all subsidiary legislation and as such differ from the U.K. Rules which are described and recognised by the Courts simply as rules of practice. The Kenyan Regulations are no clearer or more precise than their U.K. counterpart. For example, although there is a clear definition of a dependant as a person who, due to his incapacity, is incapable of taking care of himself one is obviously left in doubt under precisely what circumstances one can be said to be incapable of taking care of himself. It is, therefore,

left to the immigration officers to interpret them, just like in the U.K., to a certain extent.

As far as entry and stay of non-citizens into Kenya are concerned, the immigration officers have unfettered discretion to decide as they wish, having regard to the provisions of the regulations and any instructions that may be given to them by the Minister. As the instructions are not published they are secret in nature and are circulated among the immigration officers only. This also happens in the U.K. to some extent. A person may, therefore, qualify for entry and stay in Kenya under the Regulations and yet find himself refused entry due to the consideration of the Minister's instructions. In RE MARLES' APPLICATION¹⁹ the Court held that an immigration officer exercises his power solely upon policy and expediency as dictated to him by the Minister under whom he carries out the functions of his office. It is, therefore, clear that the Minister's instructions are very important and with no appeals system in Kenya, it is possible that there are unchecked cases where the instructions of the Minister have been allowed to override specific statutory provisions. This might, in any case, fit in with the assumption the Courts made in the above case that immigration is a privilege and accordingly a person may be refused entry and stay in Kenya for good or for bad reasons.

FOOTNOTES
(Chapter 1 (ii))

1. Cmd 5715 - 5718 (1974).
2. Since for the most part the rules for aliens and Commonwealth citizens are the same, it is not very clear why the rules for each category are drafted separately.
3. For a discussion of the Rules see I. Macdonald p. 4.
4. R. Plender pp. 168-176.
5. I. Macdonald p.5.
6. [1976] QBD 606.
7. R. Moore and T. Wallace p. 12.
8. Eg. H.C. 81(1973) para. 17 which requires that a student must spend at least 15 hours a week in organised study of a single subject. This rule is arbitrary - home students spend less than 15 hours per week in organised daytime study in some cases.
9. Eg. All the 1975 cases in the Immigration Law Report concerned with employment are on the interpretation of the rules.
10. J.M. Evans p. 102.
11. The rules can be changed any time by the Secretary of State and, therefore, there can be no guarantee of rights of admission or stay as set out in any particular rule.
12. "Structuring" is a technical term meaning the controlling of the manner of the exercise of discretionary powers within certain boundaries. K.C. Davis p.97.
13. K.C. Davis p.98.
14. Ibid.

15. R. v SECRETARY OF STATE Ex parte MUGHAL [1973] 1 W.L.R. 1133
per Widgery L.C.J. on appeal to the Court of Appeal that holding
was not reversed.
16. RE WAJID HASSAN [1976] 2 All E.R. 123 p. 130.
17. Immigration Act 1967, s. 17(1); eg. regulations on the issue of
passes.
18. Ibid. s. 17(2) and (3).
19. [1958] E.A. 153.

(iii) The Immigration Appeals System

In Kenya, no formal appeal, either to a tribunal or to the Courts, exists. There is a right under s. 5(3) of the 1967 Immigration Act to make representations to the Minister, but it is not an appeal in the sense that the rights of immigrants under the immigration system in the U.K. are ^{rights of appeal.} It is, therefore proposed to examine only the U.K. appeals system here and to defer representations to the Minister (Kenya) to a later stage.

In 1969 a system of Immigration Appeals from decisions of immigration officers was set up after the recommendations of the Wilson Committee.¹ The system has been continued under the Immigration Act of 1971 by virtue of Part II of the Act.² The system is commendable and it is the single most important method of checking the discretion of immigration authorities. What is the scope of the appeals allowed to be made under the system? There are two sides to this question:

- (I) the categories of appeals open to the applicants and
- (II) the applicants to whom it is open.

(I) The categories of appeals open to applicants are, relatively speaking, quite detailed and their scope generally clearcut, largely because of the work of the Wilson Committee.³ There is a two-tier system of appeals. Appeals are generally initially made to an adjudicator. There are a number of adjudicators all of whom are appointed by the Secretary of State. From adjudicators appeals go to the Appeal Tribunal with or without its leave. Members of the Tribunal are appointed by the Lord Chancellor. With so many adjudicators all spread over the various parts of the country, the Tribunal obviously links them and guides their decisions, thus providing an essential element of uniform law. In some cases appeals are made straight to the Tribunal. An appeal is to be allowed if the appellate body thinks that the immigration officer or, for that matter, the Secretary of State exercised a discretion not in accordance with the law or if for any reason it is thought a discretion should have been exercised differently. In all other cases the appeal must be dismissed.⁴ However, a refusal to depart from the Immigration Rules is not to be treated as an exercise of discretion.⁵ In the case of HOME SECRETARY v GLEAN⁶ the respondent was a Commonwealth student who was allowed into the U.K. for the purpose of training as a nurse.

He was allowed in in 1967. His leave to stay was renewed twice. In 1968 his wife was allowed in with no conditions imposed. In 1969 Glean gave up his training and, in breach of his conditions, entered full time employment. In 1970 he applied unsuccessfully for permission to remain in the U.K. in employment.

On appeal to an adjudicator Glean's appeal was allowed on the ground that it would be contrary to the principles of natural justice to compel him to return to Trinidad if his wife elected to remain in the U.K. with her two children as she was entitled to do. On a further appeal by the Home Secretary to the Tribunal it was held that:

"to urge that for reasons of natural justice those immigration rules should not be applied was to say that the Secretary of State ought, at Glean's request, to have departed from the rules, and since he refused to do so and his decision was in accordance with the Immigration Rules the Adjudicator had no discretion to allow the appeal on considerations of natural justice."⁷

This dictum is still good law by virtue of s. 19(2) of the Act.

When an adjudicator is making a determination under s. 19(2) there arises, in effect, a problem of whether or not he hears the case de novo. In HOME SECRETARY v PURUSHOTHAMAN⁸ the Tribunal was asked to make a ruling on whether or not the adjudicator was entitled to hear an appeal de novo under s. 8(1) of the Immigration Appeals Act 1969.⁹ The Tribunal ruled that:

"the original decision appealed against is the starting point for consideration by the Adjudicator. The task of the Adjudicator is to decide whether or not that decision is in accordance with the law or any immigration rules applicable to the case.... In carrying out that task the Adjudicator must take into account all the evidence before him and for that purpose he may review any determination of a question of fact on which the original decision was based..."¹⁰

It follows from the above dicta that although an adjudicator cannot make his mind up as if he were an immigration officer his function in this aspect greatly overlaps with that of an immigration officer and the line dividing their functions is a very fine one. For this reason it is hard to define the exact extent of the adjudicator's power when deciding cases. All that is clear is that:

"evidence of subsequent facts which if before the immigration officer might have influenced his decision by indicating some change in the appellant's original circumstances will normally form the basis of a new application..."

and will accordingly be referred to the immigration officer. It was so held in the case of ENTRY CERTIFICATE OFFICER, LAHORE v ABDULLAH.¹¹ But the holding of the case has exceptions. In ENTRY CERTIFICATE OFFICER, BOMBAY v THAKERAR & ANOTHER¹² the respondents had been refused leave to enter into the U.K. on the ground that they were not dependent on their sponsor in the U.K. under paragraph 42 of Cmd 4298.¹³ The respondents appealed and one of the grounds was that until recently the remittances sent to them from East Africa had ceased to come due to political changes there. It is because of the receipt of these remittances that the entry certificate officer felt constrained to consider them not dependent on their sponsor in the U.K. The remittances came from rental income of a family company that they had in East Africa. All family rent earning properties were in Uganda and due to a change of political climate in Uganda the remittances had ceased to come and the appellants automatically became dependent on their U.K. sponsor. This ground had not formed part of their reasons in support of an entry clearance. Evidence was given at the appeal in support of the ground and of the fact that at the time the respondents made their application to the entry certificate officer they were not receiving substantial remittances. In the circumstances the Tribunal ruled that the holding in the Abdullah case above did not apply to this situation. In its words:

"Since it has been shown that at all material times Mrs. Thakerar was dependent on money obtained from her son in East Africa and since that dependency, through new circumstances, has to be met by changed arrangements, we do not think that this is a case in which the normal procedure of new application should be followed..."¹⁴

It is not at all clear from the case of Thakerar whether a case will be referred to the immigration officer or entry certificate officer, as the case may be, at the time the application for the entry clearance was made. In other words, does a case come under the purview of the dicta of the Thakerar case only if the new

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evidence was not in existence at the time an application for an entry clearance was made? It is not clear from the case and in the circumstances it is not possible to state with precision the categories of situations falling under the Thakerar rule. It is submitted, however, that each case should be looked at individually and since in most cases referring a case back to immigration officers or entry clearance officers will be harmful to the appellants the rule in Thakerar should be applied liberally.

Under the Immigration Act of 1971 appeals may be made in the following cases:

- (i) against refusal of entry,¹⁵
- (ii) against most refusals of an entry clearance,¹⁶
- (iii) against refusals of certificates of patriality,¹⁷
- (iv) against conditions of admission and variations of length of stay or refusal to vary,
- (v) against most decisions to make a deportation order,¹⁸
- (vi) against most refusals to revoke a deportation order,¹⁹
- (vii) against directions for removal by illegal immigrants, certain deportees, seamen and aircrew,²⁰ and
- (viii) against removal to a particular destination.²¹

As noted above an appeal is made either to the adjudicator or, in certain cases, to the Tribunal. Before looking at the appeals in detail one might find it helpful to look at a table of the appeals system found in the New Law Journal.²²

Refusal of Entry:

Under s. 13(1) of the Act a person who is refused leave to enter the U.K. may appeal to the adjudicator against the decision that he requires leave or against the refusal. However, a person may not appeal against refusal of leave to enter so long as he is in the U.K., unless he was refused the leave at a port of entry at a time he held a current entry clearance or was named in a current work permit.²³ It has been suggested that this is a recognition of:

"the expectation of admission aroused in a person to whom an entry clearance or work permit has been issued..."²⁴

It is further argued that:

"because of the legalistic distinction between interests in remaining and entering may not in individual cases, in fact, represent greater or lesser degrees of hardship, the right of appeal should only ever be excluded on the narrower grounds applicable to decisions affecting the interest in remaining."²⁵

Section 13(5) of the Act further provides that a person cannot appeal against refusal of leave to enter if the Secretary of State certifies that he has given directions for the person not to be given entry into the U.K. on the ground that his exclusion is conducive to the public good, or if the leave to enter or entry clearance was refused ^{in obedience} to any such directions. Evidently, this section gives the Secretary of State room for power to exclude a person on policy grounds. If this is so it is an aspect of the power to deport a person on grounds of public good as being conducive to national security. The fact that his decision leaves the affected person with no protection is to be regretted. It appears that the person will have no right to know the grounds for the certification, no right to know the charges against him and no right to demand a hearing. It may well be as J.M. Evans says²⁶ that it is one of those non-justiciable matters affecting the public ~~and~~ which only the executive is ~~better~~ ^{best} placed to judge or that it would be prejudicial to the sources of intelligence to disclose the specific charges against the person, but one must always be conscious that:

"the menace to the security of the country, be it as great as it may, from the admission (of a person so refused entry) is nothing compared with the menace of free institutions inherent in the procedures of this pattern."²⁷

There is a case, therefore, for giving persons so excluded a right of appeal, be it statutory or otherwise. This is a rudimentary right that no person should be denied. It is submitted that the present appeals system is sufficiently well equipped to deal with cases of this kind.

A person who has a right of appeal under s. 13(1) of the Act may, if before he appeals, directions have been given for his removal to any country or territory, or if, before or after he appeals, he is served with a notice that he will be removed to any specified country or territory (or one of the several specified countries) object to being removed to such a place and claim that he ought

to be removed, if at all, to a different country or territory which he must specify.²⁸ If a person so appeals (against refusal of leave to enter) any removal directions given will cease to have effect and no such removal directions may be given while the appeal is pending.²⁹

An appeal against refusal to enter shall be dismissed by the adjudicator if he is satisfied that:

(a) the appellant was, at the time of refusal, an illegal entrant and

(b) the appellant was, at the time of refusal, subject to a deportation order.³⁰ The effect of the provision above is to deny any appeal favourable to people in the country without leave, for example, illegal entrants. It also denies such an appeal to those, who at the time of the appeal, were subject to a deportation order.

The time limit to be followed when appealing under s. 13(1) is:

(a) if a person is appealing from outside the U.K., after his departure and not less than 28 days thereafter and

(b) if he is appealing from inside the U.K., before departure, but not later than 28 days.³¹

Refusal of Certificates:

S. 13(2) of the Act provides that a person who applies for a certificate of patriality or an entry clearance may generally appeal to an adjudicator against the refusal to grant the same. S. 13(5) of the Act further says that if the Secretary of State certifies that he, personally, has given directions for the clearance certificate to be refused in the case of any one person, then that person has no right of appeal against such refusal and is not accordingly within the purview of the appeals system.

A person not holding a certificate of patriality is not entitled to an appeal on the ground that he is a patrial by virtue of s. 2(1)(c) or (d) or s. 2(2) of the Act against a decision that he requires leave to enter the U.K. unless in the case of a woman, who is a citizen of the U.K. and colonies, the ground of appeal is that she is a patrial by virtue of s. 2(1)(c) or (d).³² The effect of this is that rights of appeal are denied to the following classes of people:

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(a) U.K. and colonies' citizens who acquire patriality only after 5 years ordinary residence in the U.K. or Islands,³³

(b) Citizens of a Commonwealth country who are patrials only by virtue of their mother being born in the U.K. or the Islands,³⁴ and

(c) Women who claim to be 'patrials' as a result of having exercised their right as wives of U.K. citizens to register as U.K. citizens.³⁵ This applies only to women who registered by virtue of their marriage to a U.K. citizen before the passing of the Immigration Act 1971.³⁶ That a U.K. citizen who has qualified for patriality can be refused a right of appeal because of a lack of a certificate of patriality without recourse to an adjudicator or the Tribunal seems to be a negation of all principles of justice and a denial of a person's liberty as a citizen. For patrials, a certificate of patriality is a necessity, however, and if they are refused entry because they do not have it then their best option lies in applying for the certificate from which there is an appeal if it is refused.

Macdonald has suggested that:

"someone refused entry and denied a right of appeal under this section, should apply to the High Court for habeas corpus or a declaration that he is a patrial and therefore not subject to the immigration control or detention by an immigration officer."³⁷

One hopes that the Courts will view this like that. This is a matter of profound importance and must be viewed with the seriousness it deserves.

A woman who is a patrial by virtue of s. 2(2) of the Act (apart from any reference therein to s. (1) (c) or (d)) is automatically entitled to get her certificate of patriality either in the U.K. or from her country of origin. She cannot be required to obtain it only from her country of origin.³⁸ She has a direct access to the High Court should she be so required.³⁹ It would appear, a fortiori, that a person who has no certificate of patriality and is denied one although he is entitled to it has access to the Courts for a declaration that he is such a patrial and therefore entitled to such a certificate.

A person who is refused an entry clearance and has a right of appeal may do so only within 3 months and even then only if he is

outside the U.K. On the other hand, a person who is refused a certificate of patriality and has a right of appeal, that is persons not falling within s. 13(3) of the Act above, may appeal either within or without the U.K., but in either case within 3 months if it was refused by an entry certificate officer or within 14 days if refused by the Secretary of State.⁴⁰ One is again confronted with a ridiculous situation of being placed at the peril of losing such substantial rights if an appeal is not made as stipulated.

Appeals Against Conditions:

Section 14(1) of the Act deals with appeals against conditions. It provides:

"s. 14(1) subject to the provisions of this part of the Act, a person who has a limited leave under this Act to enter or remain may appeal to an adjudicator against any variation of leave (whether as regards duration or conditions), or against any refusal to vary it, and a variation shall not take effect so long as an appeal is pending under this subsection against the variation, nor shall an appellant be required to leave the U.K. by reason of the expiration of of his leave so long as his appeal is pending under this subsection against a refusal to enlarge or remove the limit on the duration of the leave."

A person who has limited leave to enter or remain in the U.K. may therefore appeal to an adjudicator against any variation of leave or against refusal to vary it. A variation does not take effect so long as an appeal is pending, or a further appeal is to be made or until an appeal has been withdrawn. An applicant has the right to withdraw his or her appeal unless this has been expressly prohibited by a statute. Lord Goddard C.J., in the case of R. v HAMPSTEAD & ST. PANCRAAS RENT TRIBUNAL, ex parte GOODMAN (1959) 1 All E.R. 170 at 172 thought that an application could be withdrawn up to any time before the Tribunal gave its decision.

The right of appeal under this section is available to a person only while the limited leave to enter or remain subsists. This was the holding of the House of Lords in the case of SUTHENDRAN v IMMIGRATION APPEAL TRIBUNAL.⁴¹ In this case S., a citizen of Sri Lanka, obtained a certificate giving him leave to enter and remain for 12 months on condition that he did not enter any employment or

engage in any business or profession. It was granted to enable him to take a course in engineering at a technical college. He entered on July 23, 1973 so unless the leave granted was extended, he ceased to be entitled to be in the U.K. on July 23, 1974. He did not attend the college, but obtained employment and on June 2 1974 began work as a nursing assistant at a hospital. On July 23, 1974 the hospital applied for a work permit for him, it was refused by the Secretary of State. He appealed, but his appeals were refused.

On May 20, 1975, a week after his appeal to the adjudicator had been dismissed, the hospital asked that he should stay to complete his training as a pupil nurse. On June 17 the Secretary of State refused that application and notified him that he had one month, until July 17, to wind up his affairs in the U.K. and leave. The adjudicator allowed an appeal by S. on January 16, 1976, but on June 4 the Tribunal allowed an appeal by the Secretary of State from that decision on the ground that as the appellant's limited leave to remain had expired on July 23, 1974 he had no right to appeal to the adjudicator. The Queen's Bench Divisional Court and the Court of Appeal refused his applications for leave to apply for certiorari to quash the Tribunal's decision. He appealed to the House of Lords.

The House of Lords said that a person who comes into the U.K. with a limited leave to enter or remain must apply for an extension of his stay while the limited leave is still subsisting. If he is refused an extension by the Home Secretary during that period he has a right of appeal under s. 14(1) of the Act and cannot be required to leave until his appeal is determined. But if the Home Secretary's refusal of an extension is only handed down after the limited leave period has expired, albeit through administrative delays in the Home Office, the right of appeal has gone and an extension of time to enable one to appeal will be by courtesy of the Home Secretary and not as of right under s. 14(1).

This holding's effect is that a person with limited leave to enter or remain in the U.K. cannot be allowed to appeal against a variation or a refusal to vary conditions at the time of the appeal the period he was allowed to remain in the country has expired. The Queen's Bench Divisional Court had similarly held in the case of R. v IMMIGRATION APPEAL TRIBUNAL ex parte SUBRAMANIAM. 42

These decisions have the consequence of giving the Secretary of State power to effectively deprive a person the right of appeal under this section simply by delaying a decision on the application until after the current leave to enter or remain has expired notwithstanding that the application for an extension was made while the person was lawfully in the U.K.⁴³ Such is the unfortunate, but clear meaning of s. 14(1). It submitted, however, that if the delay is such that it is grossly unfair, a person should be allowed to appeal notwithstanding the protection of s. 14(1) to the Home Secretary.

It follows from these cases that a person who applies for an extension of the leave to remain and receives an adverse answer while he is lawfully present in the U.K. is the only one who may not be required to leave while an appeal is pending. His appeal is a matter of right. In all other cases one has the right of appeal by courtesy of the Home Secretary. If he grants an extension, after the limited leave has expired, then the applicant is automatically brought within s. 14(1) of the Act. He can, therefore, appeal normally and cannot be expected to leave while an appeal is pending. It is not clear whether the Secretary of State will grant an extension on the basis of former terms or whether he will grant it on the basis that it is only for the purpose of appealing. It is hoped that it will be on the basis of former terms. One can conceive of situations where substantial interests may suffer should the Secretary of State grant an extension on the basis that it will only be for the purpose of an appeal and that appeal succeeds.

Subject to the above and to any provision to the contrary an appeal is regarded as pending from the time the appellant gives notice of appeal to the time when the appeal is finally determined or withdrawn and in any case within 14 days from the date of the refusal by the Home Secretary. However, an appeal to an adjudicator is not treated as finally determined so long as further appeal to the Tribunal can be brought.⁴⁴

In MEHTA v SECRETARY OF STATE⁴⁵ the appellant M. came to the U.K. as a student. She was given 12 months limited leave to remain in the country. Before the year expired she applied for an extension. She was given one month's extension only. She appealed to the adjudicator against this and the adjudicator allowed her

appeal on a technical point. The Home Office appealed to the Tribunal and the Tribunal allowed the appeal. She was accordingly refused an extension of the 5th of November, 1973. At the time the appeal of the Home Secretary was allowed, one of the Home Office representatives indicated to her solicitors that a further application would be sympathetically received. Thereupon her solicitors wrote two letters to the Home Office applying for an extension on November 12 and 27, 1973. By mistake the two letters were overlooked by someone in the Home Office and a short note was received by the solicitors later from the Home Office on December 4, 1973 saying that they had had no further communication from them (the solicitors) and that Miss Mehta had no further claim to remain in the U.K. and must leave within 14 days. Her solicitors were perplexed by this and they wrote back indicating that they had sent the two letters. On January 2, 1974 the Home Office discovered the two letters and wrote back apologising for the 'clerical error' and further said that the application of November 27, 1973 was considered and had been refused. The solicitors wrote on January 8, 1974 indicating that the Home Office had given an assurance to consider the application sympathetically and that since they were unlikely to revoke their decision the solicitors were to lodge an appeal on her behalf. The Home Office did not reply. The solicitors lodged an appeal on January 23, 1974 after the 14 days allowed for appeal had expired.

The Home Office contended that the appeal was out of time and must be dismissed. The question was whether rule 11(4) of the Immigration Appeals (Procedure) Rules 1972 which provided that:

"the appellate authority shall not be required to dismiss an appeal, but may allow it to proceed if the authority is of the opinion that, by reason of special circumstances, it is just and right so to do..."

could be invoked in favour of the appellant.

It was held by the Court that the duty of an adjudicator or a Tribunal was not limited solely to enquiring whether there are special circumstances which prevented giving notice of appeal within the permitted time (as the adjudicator and the Tribunal held) they had a wider discretion to do what was just and right to prevent an appellant from suffering unfairly, and rule 11(4) should be liberally

interpreted. Accordingly, the substantive merits of the case and the fact that failure to give notice in time was due to the appellant's solicitors were 'special circumstances' which the adjudicator and the Tribunal had to take into account in determining whether it was just and right to allow the appeal to proceed. The Tribunal's refusal to take into account the merits of the appellants case or so to treat as a 'special circumstance' the mistake of the solicitors in omitting to lodge the notice of appeal in time were errors of law on the face of the record and certiorari would issue to quash the Tribunal's decision.

An appeal against exclusion under this section may, therefore, be heard out of time under rule 11(4) above if special circumstances exist. This decision has extended the amplitude of the scope of the appeals under Part III of the Act.

A person cannot appeal under s. 14(1) above if:

(a) the Secretary of State certifies that the appellant's departure from the U.K. would be conducive to the public good as being in the interests of national security or of relations between the U.K. and any other country or for reasons of a political nature or if the decision questioned by the appeal was taken on that ground by the Secretary of State⁴⁶ or

(b) the appeal is made against any variation made by statutory instrument or against any refusal of the Secretary of State to make a statutory instrument.⁴⁷

The only question that arises from the above exceptions is why a Minister's decision should be so sacrosanct as to be put outside the appeals system.

The above provisions together with the case of SUTHENDRAN seem to render the options open to an appellant under s. 14(1) nil. The same result is arrived at under s. 14(2) of the Act in which it is provided that a person who has a limited leave to remain in the U.K. on ceasing to be entitled to exemption from control on entry⁴⁸ or on ceasing to be a patrial whilst in the U.K. may appeal to an adjudicator against any provision limiting the duration of leave attaching a condition to it.

An urgent amendment to s. 14(1) is called for.

Appeals Against Deportations:

Section 15(1)(a) of the Act provides:

"Subject to the provisions of this Part of the Act, a person may appeal to an adjudicator against:

- (a) a decision of the Secretary of State to make a deportation order against him by virtue of s. 3(5) above."

Section 3(5) of the Act itself provides that:

"A person who is not a patrial shall be liable to deportation from the U.K.

- (a) if, having a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave, or
- (b) if the Secretary of State deems his deportation to be conducive to the public good, or
- (c) if another person whose family he belongs to or has been ordered to be deported."

There are three kinds of deportation under this section; that is, a person deported for breach of conditions to enter or remain in the UK,⁴⁹ deportation by the Secretary of State on grounds of public good,⁵⁰ and deportation made against a person as a member of the family of the deportee.⁵¹ An appeal against deportation for breach of conditions to enter or remain in the U.K.⁵² lies to an adjudicator within 2 weeks. Notice of the decision to deport must be given to the person who may then appeal within the time.⁵³ However, no deportation order may be made by the Home Secretary so long as the person can appeal, that is, while there is time to appeal; and if the appeal has been lodged, until it is finally determined. A deportation order of this kind will not issue against a Commonwealth citizen or a national of the Republic of Ireland who was such a citizen at the coming into force of the Immigration Act 1971 and at the time of the deportation he or she had been ordinarily resident in the U.K.⁵⁴

In AHMET DOGOU MEHMET ex parte HOME SECRETARY⁵⁵ it was held that provided the decision to deport is taken within five years of the man's ordinary residence starting in the U.K., a deportation order which is made after the expiration of the five years is valid. In that case, Mehmet, a Commonwealth citizen, came to Britain on

December 27, 1970. He was given leave to enter for six months. The leave was subsequently varied to enable him to be a full time student until October 1972. When that leave expired he went underground. On June 30, 1976, before his five years were up, the Secretary of State decided to make a deportation order against him. As M.'s whereabouts were not known, notice of the decision to deport was left at his last known address.

In March 1976 after the end of five years residence M.'s solicitors applied for a regularization of his stay. He came above ground. On July 23, 1976 the Secretary of State made a deportation order against him under s. 3(5)(a). M. applied for a certiorari to quash it arguing that the Secretary of State had no right to make it after five years had expired. It is on these facts that the above decision was delivered by the Court of Appeal.

As Scarman L.J. remarked in that case, the Court draws a distinction between a deportation order and a decision by the Secretary of State to deport. The decision guards against the abuse of s. 7(1)(a) and (b), but it is doubtful whether the Act intended the creation of the distinction drawn by the Court since the Act refers only to a deportation order made within five years and not a decision to deport made within five years. In fact, s. 7(2) of the Act provides that a person shall not cease to be ordinarily resident by reason only of his having remained in the U.K. or the Islands in breach of the immigration laws. One would have thought, therefore, that the intention of the Act is to indicate to the Courts to construe liberally provisions affecting people ordinarily resident in the U.K. and accordingly a mere decision by the Secretary of State to deport made within five years residence without a deportation order should not have sufficed in this case. The Court did not decide what kind of decision of the Secretary of State to deport is a decision within the meaning of the case. Is it by notice only, as in the case, or could it be a mere oral declaration of intention? Such a power to the Secretary of State is wide and may be easily abused. It is not, either, in accordance with the attitude that an immigrant ordinarily settled must be disturbed as little as possible. It is not clear what the effect of this decision is on people who were ordinarily resident, albeit against immigration law, in the U.K. at the coming into force of the Act.

The date a decision to deport a person is made is, therefore, clearly crucial. If it is made within the five years of ordinary residence commencing a deportation order may be made later notwithstanding that it is made after the five years statutory period. The decision above has narrowed the scope of s. 15(1)(a) and placed in danger all immigrants now underground waiting for the five years to run out before they come above ground.

The Secretary of State may deport a person if he deems that person's deportation to be conducive to the public good. If the deportation is not certified by the Secretary of State as:

"conducive to the public good as being in the interests of national security or of the relations between the U.K. and any other country or for other reasons of a political nature..."⁵⁶

then an appeal lies, in the first instance, to the Tribunal. In this case, the Secretary of State has no power to make a deportation order while there is time to appeal, or, if the appeal has been lodged, until it is finally determined. He has no power either to deport a Commonwealth or Irish citizen who, since the coming into force of the Immigration Act, has been ordinarily resident in the U.K. without a break for the last five years.⁵⁷ An appeal under this section must be made within two weeks.

If, however, the Secretary of State certifies a deportation order to be conducive to the public good as being in the national interests and so on, then no appeal is possible under the Immigration Act. This provision was recently invoked in the deportation of two American journalists working in the U.K.⁵⁸ The scope of this power knows no limit. If and when the Secretary of State chooses to exercise the power then his decision is placed beyond the reach of the immigration appeals system. The only option open to such a deportee is to appeal to the Home Office Advisory Panel, an "independent body" within the Department of the Home Office. Its decision does not bind the Secretary of State and its role is purely advisory. Although the deportation of the two Americans is the second under this section it is the first to be referred to the Panel. Its decision will be of much interest. It must be noted, however, that an appellant is not allowed legal representation at the Panel, but he may be assisted by a friend who may be a lawyer. The panel has no power to reveal

the details of the case against the deportee and it cannot, either, reveal any evidence or sources of evidence that might lead to disclosure of evidence.⁵⁹ This means that the appellant has virtually no way of rebutting the charges against him. His appeal to the Panel must be made within 14 days.⁶⁰

Macdonald has said that the distinction between a deportation order made on grounds of public good and a deportation made on grounds of public good as being in the interests of national security and so on stems from the:

"distinction between deportation because of suspected, but not necessarily proven, criminal activities and deportation because of political activities or affiliations."⁶¹

There may be other grounds for distinguishing the two kinds of deportations.

The Secretary of State has power, under s. 3(5)(c) of the Act to deport another person whose family he belongs to is or has been ordered to be deported. If a man is deported his wife and children under the age of 18 may be deported,⁶² and if a woman is deported, her children under the age of 18.⁶³ The proviso to s. 5(4)(a) and (b) of the Act says that:

"for the purposes of (the) subsection an adopted child, whether legally adopted or not may be treated as the child of the adopter and if legally adopted, shall be regarded as the child only of the adopter, (and) an illegitimate child ...shall be regarded as the child of the mother..."

A family deportation cannot be made by the Secretary of State if more than 8 weeks have elapsed since the other person deported left the U.K. after a deportation order against him or her.⁶⁴ Neither can a person be deported under this section if at the time of the deportation he has ceased to be a member of the family of the person deported. Macdonald says that this may:

"happen in the case of a wife, if her marriage is dissolved, and in the case of children if they reach the age of 18..."⁶⁵

A woman separated from her husband will probably be considered part of the family of a deported husband under this section.

If the Secretary of State decided to deport a person as a

member of the family of a deportee he must notify the member and, if more than one, each individually. The person then has two weeks within which to appeal to the Tribunal in the first instance.⁶⁶

A deportation order cannot be made against such a person so long as he has a right of appeal, and if he has appealed, until the appeal is finally determined.⁶⁷ That period of appeal is not counted in calculating the 8 weeks limit imposed by s. 5(3) above.⁶⁸

On an appeal under the family deportation section an appellant cannot be allowed to dispute the truth of a statement with a view to obtaining leave for the appellant to enter or remain in the U.K.⁶⁹ unless:

(a) the statement was made by a person who was not an agent and the appellant did not know of it and

(b) in the case of a child over the age of 18 years old if the age was understated, in which case he will be allowed to prove his true age.

It is doubtful if this section covers children over the age of 18 years and under the age of 21 years who are entirely dependent on the deported persons. It is also possible to foresee Courts arguing that if the Secretary of State decides to deport a family whose "head" has been deported and serves a deportation notice before the expiry of the 8 weeks he would be duly entitled to deport them anytime after the 8 weeks. This would be in the general spirit of

A.D. MEHMET ex parte HOME SECRETARY, the case above. If this becomes the case, as it might well do, the protection offered by s. 5(3) of the Act to the members of the family will be virtually eroded away. The same is true of s. 7(1)(2) and (3) of the Act which relate to a Commonwealth citizen or a citizen of the Irish Republic who has been ordinarily resident in the U.K. for five years when the Secretary of State makes a deportation and who was such a citizen at the coming into force of the 1971 Immigration Act. It seems possible that before the five years are over the Secretary of State can serve a deportation notice on him and if he does so, he can wait until the five years are over to make a deportation order. He cannot be barred then by the fact that the person has been ordinarily resident in the U.K. for the last five years and that he is a citizen of a Commonwealth country or the Republic of Ireland as he was at the coming into force of the 1971 Immigration Act.

A person who is not a patrial shall not have a right of appeal if after he has attained the age of 17 years he is convicted of an offence for which he is punishable by imprisonment and on his conviction is recommended for a deportation by a Court empowered with that jurisdiction.⁷⁰ Under this section the right to appeal is in accordance with the normal procedure of the Courts. The right of appeal under the immigration appeals system exists only against the country to which he is to be deported and the onus is on the appellant to show that that country to which he wishes to go, if he appeals, has accepted him.⁷¹ Both the Immigration Act and the rules are silent on the point of to whom an appeal against the country of deportation may be made and within what time. But it appears from the cases that adjudicators hear the appeal in the first instance with a right of further appeal to the Tribunal.⁷²

Appeals Against Revocation:

An appellant has a right of appeal to an adjudicator in the first instance against the refusal of the Secretary of State to revoke a deportation order made against him.⁷³ The right of appeal is limited to the extent that he cannot appeal against such refusal to revoke a deportation order if the Secretary of State certifies that the appellant's exclusion from the U.K. is conducive to public good or if revocation was refused by the Secretary of State personally.⁷⁴ Further, a person may not appeal against a refusal to revoke a deportation order either, so long as he is in the U.K., or if he has failed to comply with the requirement to leave or he contravened a prohibition of entry into the country.⁷⁵

An appeal against refusal to revoke a deportation order can therefore be made only from outside the U.K. and it must be made within 28 days following the refusal by the Secretary of State. When the appeal is before an adjudicator, as it should be,⁷⁶ and a related appeal is brought, that is, an appeal by a person belonging to the family of the deportee, then the adjudicator must transfer the case to the tribunal which will take the appeal up as an appeal to it in the first instance.⁷⁷

Appeals Against Removals:

Where directions are given under the Act for a person's

removal from the U.K. either on the ground that he is an illegal entrant or on the ground that he has entered the U.K. in breach of a deportation order then the person against whom the directions are issued may appeal to an adjudicator against those directions on the ground that on the facts of the case there was in law no power to give them on the ground on which they were given.⁷⁸ Such a person cannot appeal against such directions so long as he is in the U.K. except where directions were given by virtue of a deportation order and he is appealing on the ground that he is not the person named in the order.⁷⁹

An appeal in the above cases lies to an adjudicator in the first instance and must be made within 28 days if the appeal is made from outside the U.K. but in all other cases it must be made before or after departure from the U.K. but not later than 28 days. While the appeal lies, directions for removal are suspended until the appeal has finally been disposed of.⁸⁰

Macdonald has submitted, rightly, that the right of appeal above to a person is virtually valueless because if:

"it is alleged that there is a deportation order against him and he is disputing that he is the person named in the order...what is in issue is the legality of his removal ie. whether the authorities are entitled in law to remove him."

Since the immigration authorities cannot remove him unless he is an illegal entrant within the meaning of the Act, to refuse him an appeal while in the country to test "the legality of the order"⁸¹ seems to be meaningless, to put it mildly.

However, there is nothing in the Act to stop a person detained as an illegal entrant pending removal from applying to the Court for habeas corpus by which means the legality of his impending removal may be tested. A habeas corpus is granted if the appellant can show, *prima facie*, that his detention is illegal.⁸² It is established that the onus of proof on the appellant is not displaced in most cases.⁸³ This makes the right of appeal above all the more valueless. Moreover, an illegal entrant has no right of appeal against the country or territory to which he is being removed.⁸⁴ But the right to object to the destination will arise where such an illegal entrant defies a deportation order against him.⁸⁵ A person who has entered or is trying to enter the country in breach of a deportation

cannot be allowed to question the validity of the original deportation order, however.⁸⁶

Directions may also be given under the Act and in particular under the special powers conferred by schedule 2 to the Act for the removal of members of the crew of a ship or aircraft or persons coming to the U.K. to join a ship or aircraft as a member of the crew.⁸⁷ Any of these people served with a removal direction may appeal to an adjudicator against that direction on the ground that on the facts of the case there was in law no power to give the direction on the ground it was given. Where the direction was made by way of deportation he can only appeal on the ground that he is not the person named in the order.⁸⁸ An appeal under this section against directions for removal shall be dismissed by the adjudicator, notwithstanding that the ground of appeal may be made out, if he is satisfied that there was no power to give the directions on the ground that he was an illegal entrant.⁸⁹ In any case, such an appeal must be made if from outside the U.K. within 28 days after departure, and in all other cases before or after departure, but not later than 28 days.

No appeal of the kind above will lie, against the country or territory to which the person is being removed.⁹⁰ The right of appeal is much curtailed and largely illusory.

Appeals Against Destination:

Section 17 of the Act is generally referred to above. It must be noted, however, that where directions are given for a person's removal from the U.K. either

- (a) on his being refused leave to enter or
- (b) on a deportation order being made against him or
- (c) on his having entered the U.K. in breach of a deportation order;

he may appeal to an adjudicator against the directions on the ground that he ought to be removed, if at all, to a different country or territory specified by him.⁹¹ In ALI v IMMIGRATION APPEALS ADJUDICATOR⁹² it was held that in such an appeal the appellant's well-founded fear of persecution if he is sent back to his own country is not a point to be taken into account although nothing will prevent him from representing the fears to the Secretary of State before he makes a deportation order. It was also decisively ruled in HOME

SECRETARY v FARDY⁹³ that where a deportation order has been made on the recommendation of a Court the immigration appeals system does not provide scope for an appeal on the ground that the appellant has a well-founded fear of persecution.

A person cannot, either, appeal against any directions given following a refusal of leave to enter the U.K. unless he is at the same time appealing against the refusal of leave to enter or unless he was refused leave to enter when he held a current entry clearance or was named in a current work permit.⁹⁴

There is no appeal of any kind either to an adjudicator or the Tribunal against the method of allocating special vouchers to British passport holders of East African Asians or against the refusal of the Department of Employment to issue work permits or approve training schemes, or against the removal or exclusion of a person under the Prevention of Terrorism Act 1976 except that one may appeal to an independent panel under the Prevention of Terrorism Act 1976.

If one sees immigration law as a tool of economic regulation then one must accept the necessity of linking immigration closely to the labour market demands of a country.⁹⁵ In such circumstances it is probably right that the Government as the "managing director" of the economy should be the sole judge of the number and classes of work permits.⁹⁶

Immigration means a lot more than the economic regulation of the labour force and accordingly it is questionable if it is right for the executive to control the issue of work permits without any appeal allowed to an affected individual.

(II) Finally, when the Wilson Committee on Immigration Appeals was set up its terms of reference were to look into appeals open:

"to aliens and to Commonwealth citizens who are refused admission to, or are required to leave the country."⁹⁷

The Committee did not, therefore, have in mind the citizens of the U.K. and colonies. The 1969 Immigration Appeals Act did not contemplate them either. The effect of the wholesale incorporation of the 1969 Immigration Appeals Act into the 1971 Immigration Act together with the introduction of the term 'patriality' has been to widen the scope of the appeals system to citizens of the U.K. and colonies ~~and~~

who do not qualify as patrials. It is , in fact, arguable that the citizens of the U.K. and colonies who are not patrials are entitled to a direct appeal to the Courts. This is because the Immigration Act 1971 simply provides that the:

"Immigration Appeal Tribunal and adjudicators provided for by the Immigration Appeals Act 1969 shall continue"

and, as we know, the 1969 Act was based on the recommendations of the Wilson Committee whose terms of reference did not cover the citizens of the U.K. and colonies. In practice, however, citizens of the U.K. and colonies who are not at the same patrials are placed on the same footing as aliens and other Commonwealth citizens.

FOOTNOTES
(Chapter 1 (iii))

1. Cmnd 3387, 1967.
2. ss. 12 - 23.
3. The Wilson Committee 1967.
4. Immigration Act 1971, s. 19(1).
5. Ibid. s. 19(2).
6. [1972] Imm. A.R. 84.
7. Ibid. p. 85.
8. [1972] Imm. A.R. 176.
9. That section was in para materia with Immigration Act 1971 s. 19(1)
10. HOME SECRETARY v PURUSHOTHAMAN [1972] Imm. A.R. p. 178.
11. [1973] Imm. A.R. 57 p. 61.
12. [1974] Imm. A.R. 60.
13. Cmnd 4298 para. 42, now H.C. 79 (1973) para 45 provided for widowed mothers admission.
14. [1974] Imm. A.R. 60 p. 63.
15. Immigration Act 1971, s. 13(1).
16. Ibid. s. 13(2).
17. Ibid.
18. Immigration Act 1971, s. 14(1).

19. Ibid. s. 15(1)(a).
20. Ibid. s. 16(1)(a) and (b).
21. Immigration Act 1971, s. 17(1)(a),(b) and (c).
22. L. Grant and J. Constable, 1975 vol 125 New Law Journal pp. 745-748.
23. Immigration Act 1971, s. 13(3). In VAN DUYN v THE HOME OFFICE [1974] CMLR 1 on EEC national who made an 'appeal' to the High Court while in the country without any objection.
24. J.M. Evans p. 125.
25. Ibid.
26. Ibid.
27. Per Professor J.O. Freedman, The Times December 2, 1976, p. 17.
28. Immigration Act 1971, s. 17(2).
29. Ibid. Schedule 2 para. 28(1).
30. Immigration Act 1971, s. 13(4).
31. See L. Grant and J. Constable, 1975 vol 125 New Law Journal pp. 745 - 748.
32. Immigration Act 1971, s. 13(3).
33. Ibid. S. 2(1)(c).
34. Ibid. S. 2(1)(d).
35. British Nationality Act 1948, s. 6(2).

36. Immigration Act 1971, s. 2(2).
37. I. Macdonald p. 88.
38. R. SECRETARY OF STATE ex parte PHANSOPKAR [1976] QBD 606.
39. Ibid.
40. L. Grant and J. Constable, 1975 vol. 125 New Law Journal pp. 745 - 748.
41. The Times, October 28, 1976 p. 14 (H.L.).
42. Ibid.
43. The judgements in SUTHENDRAN v IMMIGRATION APPEAL TRIBUNAL [1977] A.C. 359 were not unanimous and their Lordships were uneasy about its particular practical consequences. See Lord Wilberforce and Lord Kilbrandon L.J.'s judgements. A statutory instrument has now been made altering the consequences of the case. See S. I. No. 1872 of 1976 which gives an applicant 28 days from the date of the decision of the Home Office to appeal.
44. Immigration Act 1971, s. 33(4).
45. [1975] 2 All E.R. 1084.
46. Immigration Act 1971, s. 14(3).
47. Ibid. s. 14(4).
48. Ibid. s. 8.
49. Ibid. ss. 15(1)(a) and 3(5)(a).
50. Ibid. ss. 15(1)(a) and 3(5)(b).
51. Ibid. ss. 15(1)(a) and 3 (5)(c).
52. Ibid. s. 3(1)(b) and (c).

53. Ibid. s. 18.

54. Suggestion in ISLAM v SECRETARY OF STATE [1975] Imm. A.R. 106, and Immigration Act 1971, s. 7(1). The effect is that a person is safe from deportation under that part if he has lived away from the U.K. for a period after the Act came into force and returned to complete the five years residence.

55. The Times, December 15, 1976, p. 13.

56. Immigration Act 1971, s. 15(3).

57. Ibid. s. 7(1). A person loses immunity under the section if after the Act comes into force he lives away from the U.K. (excluding short short breaks like a holiday), A.D. MEHMET ex parte THE SECRETARY OF STATE FOR THE HOME DEPARTMENT, The Times December 15, 1976, p. 13 applies to the section with equal force and to the same extent.

58. Mr. M. Hosenball and Mr. P. Agee - The Times, March 30, 1977.

59. Maudling's Guidelines to the Home Office, June 1971, The Times November 19, 1976, p. 12.

60. Query: could the Journalists be tried by a Court under the Official Secrets Act? The European Commission on Human Rights replied in an appeal by P. Agee that deportation on grounds of national security was an act of State over which it had no jurisdiction and the Court of Appeal held that natural justice fell to second place where national security was involved. The Times March 30, 1977, p. 3.

61. I. Macdonald p. 102.

62. Immigration Act 1971, s. 5(4)(a).

63. Ibid. s. 5(4)(b).

64. Ibid. s. 5(3).
65. I. Macdonald p. 103.
66. Immigration Act 1971, ss. 15(1) and 7(1).
67. Immigration Act 1971, s. 15(2).
68. Ibid.
69. Ibid. s. 15(6).
70. Ibid, s. 3(6).
71. Eg. H.C. 82 (1973) para 61 and HOME SECRETARY v CRONING [1972]
Imm A.R. 51 and more recently CSENYI v HOME SECRETARY [1975] Imm.
A.R. 92.
72. HOME SECRETARY v CRONING [1972] Imm. A.R. 51 and CSENYI v HOME
SECRETARY [1975] Imm. A.R. 92.
73. Immigration Act 1971, s. 15 (1)(b).
74. Ibid. s. 15(4).
75. Ibid. s. 15(5).
76. Ibid. s. 15(7).
77. Ibid. ss. 15(8) and 15(9).
78. Ibid. s. 16(1)(a) and proviso.
79. Ibid. s. 16(2).
80. Ibid. Schedule 2, para 28(1).
81. I. Macdonald p. 90.

82. RE WAJID HASSAN [1976] 2 All E.R. 123.
83. Ibid and cases cited therein.
84. Immigration Act 1971, s. 17(1).
85. Ibid. s. 17(1)(c).
86. Ibid. s. 16(3).
87. Ibid. s. 16(1)(b) and Schedule 2 para 8 ff.
88. Ibid. s. 16(2).
89. Ibid. s. 16(4).
90. Ibid. s. 17(1).
91. Ibid.
92. [1972] 117 Sol. Journal 35 C.A.
93. [1972] Imm. A.R. 192.
94. Immigration Act 1971, s. 17(5).
95. How would one justify patriality if immigration was an economic function?
96. Should a government deprive a person a work permit if it is the only means of livelihood?
97. Cmd. 3387, 1967.

(iv) Deportations and Removals

In both the United Kingdom and Kenya provisions have been made for the deportation of certain categories of:

- (A) non-patrials, in the case of the U.K., and
- (B) generally speaking non-citizens in the case of Kenya.

This part is an examination of the people who are liable to be deported and the reasons or grounds for which they may be deported.

(A) U.K.:

In the U.K. a non-patrial may be deported from the country notwithstanding that he has an indefinite leave to stay:

- (1) by the exercise of prerogative powers, in the case of aliens,¹
- (2) if he is in breach of conditions of stay,
- (3) if it is recommended by a court of law,
- (4) following a deportation of a member of a family, and
- (5) on grounds of the public good.

Removal of a non-patrial from the U.K. may also be effected by means of:

- (6) a mental patient being recommended to leave under the Mental Health Acts, and
- (7) repatriation, i.e. voluntary return.

These last two grounds are not, technically, deportations, but they will also be examined.

There is one exception that must be noted. Commonwealth and Irish citizens who are not patrials may not be deported if they were ordinarily resident in the U.K. since the coming into force of the 1971 Immigration Act if the ground of deportation is that the Home Secretary deems it conducive to the public good.² However, they can be deported on other grounds, for example, for being in breach of conditions of stay or for being members of a family of a deported person. The Home Secretary's power to deport on other grounds such Commonwealth and Irish citizens ceases once the citizens have been resident in the U.K. for the last five years from the time he, the Home Secretary, makes his decision to deport, provided also the people were ordinarily resident in the country on the coming into force of the 1971 Immigration Act.³

It was noted elsewhere that a person can be ordinarily resident in the U.K. and Islands notwithstanding that he remains

in the country in breach of immigration laws. Accordingly Commonwealth and Irish citizens may, in some cases, find themselves protected against deportation on grounds other than public good, although they have remained in breach of the law. The Home Secretary may, however, deport such Commonwealth or Irish citizens on grounds other than the public good after five years ordinary residence if he, the Home Secretary, decides to deport before the expiry of the five years' ordinary residence.⁴ In AZAM v HOME SECRETARY⁵ the House of Lords, in interpreting s. 33(2) of the Immigration Act 1971, which says that a person is not to be treated as ordinarily resident in the U.K. at a time he is there in breach of immigration laws, said that s. 33(2) applied to people who entered the U.K. illegally originally. An illegal entrant cannot, therefore, cease to be ordinarily resident within the meaning of s. 7(2) of the 1971 Act if he has never so been in the first place. In other words, an illegal entrant cannot be ordinarily resident. Accordingly, illegal entrants are liable to be deported on any ground notwithstanding that they were Commonwealth or Irish citizens who had been in the U.K. for more than five years. This was the case until 1974 when Mr. Roy Jenkins, Home Secretary, as he then was, announced a ~~patrial~~ amnesty for illegal entrants. It provided that Commonwealth citizens who entered the U.K. before January 1, 1973, and who were on that date immune from prosecution and deportation for illegal entry had leave to remain indefinitely.⁶ Their wives and children would be allowed to join them on obtaining entry clearances.

The purpose of the amnesty above was to neutralise the retroactive effects of s. 33(2) of the Immigration Act 1971. Therefore, Commonwealth and Irish citizens who entered the U.K. clandestinely before January 1, 1973 became immune from deportation on the ground of the public good if they had been "ordinarily resident" in the U.K. for more than five years before the Home Secretary decided to deport them on the ground of public good. This may be viewed as an extension of the protection from deportation given to Commonwealth and Irish citizens if they have been ordinarily resident in the U.K. for the last five years from the date of their entry into the U.K. The amnesty does not apply to such Commonwealth and Irish citizens who have entered the U.K. after January 1, 1973. The amnesty does not, either, apply to aliens. This is a surprising thing because

it is inconsistent with the effort of assimilating the immigration laws of the aliens and British subjects and because there is no apparent logical reason for their omission. One must note, however, that the amnesty did apply to Pakistani citizens, but at that time they were Commonwealth citizens and not aliens as they are now.

Prerogative Powers

As was noted elsewhere, probably the British Crown has always had the power to order the removal of aliens from the U.K. S. 33 (5) of the 1971 Act provides:

"This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of her prerogative."

It follows from the provision above that the Crown still has power to order the removal of aliens from the U.K. An alien who seeks entry into the U.K. can be served with a deportation order notice before entry by virtue of the Crown prerogative. In SCHMIDT v HOME SECRETARY⁷ Widgery L.J., as he then was, held that:

"When an alien, approaching this country, is refused leave to land he has no right capable of being infringed...In such a situation the alien's desire can be rejected for good reason or for bad, for sensible reason or fanciful or for no reason at all."

The Crown has, as the above case shows, always had the prerogative power to refuse entry to an alien. What has never been clear is whether the Crown can deport an alien already in the country by virtue of her prerogative powers.⁸ The power to deport an alien already in the country has never been exercised and although it may be an indication of the restraint with which the Crown exercises the prerogative power to deport, it may equally be an indication of the uncertainty surrounding the existence of the power.

The prerogative power to refuse entry to an alien is obviously unlimited in scope. If the power to deport an alien already in the country does exist, it is submitted that it is also of unlimited scope and perhaps it is a good thing in that case that they have never been exercised.

Breach of Conditions

As was noted previously, leave to enter the U.K. may be given to a non-patrial for a limited period with some conditions restricting him to take employment and or requiring registration with the police.⁹ Under the present immigration rules:

"deportation will normally be the proper course where the person has persistently contravened or failed to comply with a condition or has remained without authorisation (although)... full account is to be taken of all the relevant circumstances before a decision is reached."¹⁰

The rule supplements a mandatory statutory enactment that a non-patrial having only a limited time to enter or remain and who does not observe a condition attached to the leave or remains beyond the time limited by the leave shall be liable to deportation.¹¹ It follows from the above provisions that a person who remains beyond the limited leave given to him is in breach of that condition and can be deported. This is so, notwithstanding that the person has been ordinarily resident in the U.K. for five years if the Home Secretary decided to deport him during the subsistence of the five years.¹² A person can also be deported for being in breach of the conditions of his stay, in particular, for overstaying, notwithstanding that at the time the deportation order was made, his application for an extension of stay was being considered.¹³ Further, a person admitted with a work permit for a specific job can be liable to deportation if he changes his job without the knowledge and authority of the Home Office because that would amount to a breach of the conditions of one's stay.¹⁴ What is not clear here is whether a person with a work voucher who is admitted to a specific job but becomes redundant or for some other reason loses his job can be deported, if he takes another job without the knowledge and authority of the Home Office. On the strict interpretation of the provisions it would seem legal for the Home Secretary to deport such a person if he takes another job following his redundancy without first getting the authority of the Home Office.

A person can overstay in spite of the fact that his application for an extension of leave to remain during the subsistence of his leave to remain, but due to administrative delays or inefficiency the application is not considered before his leave to remain expires.¹⁵ That such a person is liable to deportation is fundamentally

wrong and offends against the sense of justice or fairness.

It is also becoming clear that the Home Secretary can deport a non-patrial on the ground of refusal or failure to comply with conditions of leave to remain although his main reason for the deportation is to prevent such a non-patrial being immune to deportation by being ordinarily resident in the country for five years.¹⁶ It is not deducible from the Act that such an action is available to the Home Secretary and it may, therefore, in all probability, be illegal.

The Home Secretary can only act as above when acting in accordance with the immigration rules. The immigration rules under which a non-patrial may be deported for breach of conditions are too loosely worded that the Home Secretary has power to deport a non-patrial mainly for reasons unconnected with the breach of conditions. In HOME SECRETARY v ALUKO¹⁷ the tribunal held that in deciding whether deportation was a proper course (under s. 3(5)(a) of the 1971 Act) it was a relevant consideration that a person "ordinarily resident" would after five years become exempt from deportation under s. 7(1) of the Immigration Act 1971. s. 3(5)(a) of the Act gives the Home Secretary power to deport a non-patrial if he has a limited leave to enter or remain and he fails to observe those conditions.

In the circumstances like those of the case above the scope of the power of the Home Secretary to deport non-patrials on grounds of breach of conditions of stay becomes extremely wide. The tribunal also seems to treat or take the immigration rules as an act of faith and allows itself, consequently, to be bound by them. That kind of attitude is a dangerous one because it apparently allows the Home Secretary to be influenced by other considerations than the breach of conditions of stay.

In LEE v HOME SECRETARY the appellant sought an extension of his leave in order to pursue his studies. Admittedly he was in breach of conditions of his stay because he had ignored the time limit and other conditions subject to which he was admitted. The application for an extension of stay was refused and on appeal to the adjudicator, the adjudicator was constrained to refuse to allow the appeal mainly on the ground that other students might think that they could get away with breaking rules and that he might create a

mistaken belief in the leniency of the Home Office. On a further appeal to the tribunal against the decision of the adjudicator for taking extraneous considerations into account, ie. the breaking of rules by other students and the creation of a false belief on the leniency of the Home Office, the tribunal, dismissing the appeal by Lee, ruled that:

"it would, we think, have been wrong if he (adjudicator) had dismissed the appellant's appeal, regardless of the nature of and gravity of the appellant's breach of the rules, solely because other students' disregard of the rules should be stamped on."¹⁹

Having made that observation the tribunal further held that the adjudicator did not err in taking into account the "irrelevant considerations", ie. breaking of the rules by other students and giving a mistaken impression of the leniency of the Home Office. The ruling above also leaves the Home Secretary, the adjudicator and the tribunal with unlimited discretion to deport a non-patrial mainly on grounds that are extraneous, illegal or of doubtful legality. Thus the scope of the power to deport a non-patrial on grounds of failing to observe the conditions of stay is wide and for as long as some kind of breach against the time limit or conditions has been committed it is possible to deport that person on other grounds.

Notice of the deportation for breach of conditions of leave to remain must be given to the person to be deported²⁰ but if the person cannot be found all that the Home Secretary has to do is to post the notice of his decision to deport (as opposed to a deportation order) to the last known address of the person.²¹ Where the person is served with the notice of the decision of the Home Secretary to deport him the person has a right of appeal and, as noted elsewhere, he cannot be deported, ie. removed from the U.K. so long as he has a right of appeal or so long as the appeal is pending. But if the person was not found all that the Home Secretary has to do is wait until the person ^{comes} from his hiding and make a deportation order for his removal from the U.K. In this case there is no right of appeal against the deportation order.

Recommendation of Deportation by the Court

The Secretary of State has statutory power²² to deport a non-patrial who, having attained the age of seventeen, is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by the Court. There is no statutory obligation on the Secretary of State to deport some one as a matter of course once a Court has recommended that deportation. If the person is sentenced to imprisonment as well the Secretary of State seems to have power to deport the person before the imprisonment, during the continuance of the sentence or after the expiration of the sentence.²³

The Secretary of State has power, on the other hand, to deport a person convicted of a crime by a court of law although that person has not been recommended to be deported.

The Rules provide that:

"in considering whether to give effect to a recommendation for deportation made by a Court on conviction the Secretary of State will take into account every relevant factor, including age, length of residence in the U.K., personal history, including character, conduct and employment record, domestic circumstances, the nature of the offence of which the person was convicted, previous criminal records, compassionate and any representations received on the person's behalf."

Further still:

"where the Court has not recommended deportation there may, nevertheless, be grounds in the light of all the relevant information and subject to the right of appeal, for curtailment of stay or a refusal to extend stay followed, after departure, by a prohibition on re-entry."²⁴

That the Secretary of State has or should have that mass of knowledge of an individual reminds one of the frightful world of "Big Brother". Moreover, it is possible under the wide scope of the rules above for the Secretary of State to deport anyone for any reason or for no reason so long as that person has been convicted leave alone recommended to be deported. This power is very considerable and may be a convenient instrument that could be used to expel all convicts from the U.K. There is nothing in the Act itself to suggest this. It is possible to infer from the fact that the Secretary

of State is not under a duty to deport every person so recommended that Parliament intended the power to be used selectively and, even more important, did not want to give the Secretary of State such draconian powers as he has arrogated to himself through the device of the rules. Recent statistics show that the Secretary of State has used his powers under the rules extensively in the deportation of Commonwealth citizens.²⁵

There are other ways open to the Secretary of State for removing people recommended by Courts to be deported. A person so recommended may be asked to leave voluntarily or may be required to leave under supervised departure with a prohibition placed on him against re-entry into the U.K.²⁶ J.M. Evans has submitted that the practical effect of a supervised departure is the same as deportation.²⁷ This is true only insofar as removal from the U.K. is concerned. The effect is not the same from the point of view of the country to which the person is going to be removed to. In CSENYI v HOME SECRETARY²⁸ supervised departure was preferred to deportation because the former enabled the Secretary of State to send the appellant to Germany when, in fact, he wanted to go to Spain.

The scope of the power of the Secretary of State to deport people who have been recommended for deportation is, therefore, very wide. All he needs, normally, to justify his actions is a conviction of a person by a Court of law. A court recommends deportation only when a convicted person has been given at least seven days notice in writing stating that he is not liable to deportation if he is a patrial.³⁰

No appeal lies to the immigration appeals system from the recommendation for deportation by a Court.³¹ A recommendation is treated as a sentence for the purpose of appeal in England and Wales, but in Scotland it is treated as a conviction for the purpose of appeal.³²

Family Deportation

A person who is not a patrial is liable to deportation from the U.K. if another person to whose family he belongs is or has been ordered to be deported.³³ Detailed provisions of what the Secretary of State may take into account before making such a deportation are in the rules.³⁴ Generally speaking, before the Secretary of State

will deport the wife or child under 18 of a person so deported he will consider their length of stay in the U.K., their connection with the country, their ability to maintain themselves without recourse to public funds, compassionate circumstances and any other representations they may make.³⁵

It is apparent from the rules that the power to deport a member of a family is very considerable. However, the Act is restrictively worded and accordingly probably excludes dependents other than the wife and children of a deported husband or wife.³⁶ This may be a reflection of the concept of a "family" in the U.K. as being the nuclear family unit. This would miss the fact that a lot of the immigrant communities in the U.K. believe in extended family units. It is submitted that the dependents of a deportee, other than the wife and children, are not deportable under this head. However, the Secretary of State may by deporting the breadwinners of such dependents cause them to leave the country voluntarily. This is in any case the option open to the Secretary of State in the case of children born to the family of such a deportee in the U.K. or the Islands. This is so because the Secretary of State has not power to deport a patrial even if he is below the age of 17 years.

The rules say that where the wife of a deported person has qualified in her own "right" to stay in the U.K. she has a valid claim of stay notwithstanding the deportation of the husband.³⁷ But the rules are merely permissive, not mandatory, and a deportation order against a non-patrial wife may probably be made in spite of the fact that she has qualified for settlement in her own right. On the other hand the Tribunal has ruled that where a deportee's wife has not qualified for settlement, but she can maintain herself and her children without recourse to public funds, she should not be deported.³⁸ But if such a wife has not qualified for settlement in her own right and cannot support herself she will be deported.³⁹

The rules further state that where a wife has been living apart from the principal deportee it will not normally be right to deport her or any children living with her.⁴⁰ This provision does not state in any way what constitutes "living apart". Presumably it means if they are divorced legally. Suppose they are separated either by a Court order or voluntarily, would they be considered as living apart? Or suppose that only a decree nisi for divorce has been

granted, would they be considered as "living apart"? In other words, is the term "living apart" to be understood in the practical and physical "living apart" sense or in the legal sense? It is not clear and there is no guide as to the scope of the power of the Secretary of State in these circumstances.

When can it be said that children living with their mother are living apart from the principal deportee? Suppose in fact that the wife of a deportee has been awarded the custody of the children by a Court, but the deportee is charged with the duty of their financial welfare, eg. educating them, are the children to be considered as part of the household of the wife or the deportee? It could be in some cases that the wife cannot support herself and the children of whom she has custody (particularly when they are young), but it is doubtful if the Secretary of State has power to deport them notwithstanding that she may be divorced from her husband and may not have qualified for settlement in her own right.

There is also no indication anywhere of what the Secretary of State's power is in relation to jointly adopted children where the wife of the deportee has qualified for settlement in her own right and she can support herself.

All the questions above reveal that the Secretary of State's power, in relation to family deportations are anything but clear and his discretion is presumably wide and unbridled in this area. Although he would consider each case individually it is clear that the scope of his powers is wide, undefined and undefinable having regard to various family situations.

The Act provides that where the person deported under this section is a woman her family will be her children under the age of 18 years.⁴¹ "Child" is defined as her adopted child, whether legally adopted or not and her illegitimate child.⁴² This provision is, unfortunately, vague. It appears to exclude the husband if the woman to be deported is married. If that is so, as it appears, then the Act obviously discriminates against women. It will also be against the interest of the children under the age of 17 years in some cases if in all the circumstances where a married mother is deported, her children under the age of 17 years and who are unmarried have to leave the country with her. But there is an exception in this section. The Secretary of State has no power under the Act to

deport a child born in the U.K. although the child is less than 17 years old.⁴³ Such children can remain and stay with the father if the wife is deported.

On the other hand the Act also discriminates against men in that it presumes them incapable of caring for children under the age of 17 when the mother is a deportee. Such is the contradictory nature of scope of this unusual section on family deportation. Its scope is so wide that it even gives the Secretary of State power to indirectly do what he cannot do directly. For example, if the woman to be deported has children who are citizens of the U.K. and born in the U.K. they will often accompany the mother if they are below 17 years of age with no means of supporting themselves notwithstanding that they are patrials. Thus the Secretary of State achieves the removal of the children from the U.K. which he could not do directly. The section thus gives the Secretary of State power to deport family members either directly or indirectly for no "crime" of their own. If there is anything that cuts across the tenets of human rights and the principles of fairness this is it.

The rules provide that the Secretary of State will take into account, in the case of children under 17 years, the disruptive effect of their removal on their education and whether plans for their care and maintenance in the U.K. are realistic and likely to be effective.⁴⁴ If they are deported they may qualify for re-admission when they are 18 years and so will the wife if her marriage with the deported man is subsequently dissolved.⁴⁵

If the Secretary of State wishes to deport someone as a member of a family of a deported person he must notify each of them personally of his decision before eight weeks have elapsed from the date the deportee left the U.K.⁴⁶ As has been noted elsewhere, if the other members of the family cannot be found within the 8 weeks, but the Secretary of State has decided to deport them it is surmised that he can serve them with deportation orders after the eight weeks have elapsed following the reasoning of the Court in AHMET D. MEHMET v HOME SECRETARY⁴⁷. Moreover, the Secretary of State will invariably have made his mind up to deport the family if and when he decides to deport a member of it. It follows that the 8 weeks grace period is largely illusory. But a family deportation will cease to have effect if in a rare case the Secretary of State does not deport the

family within 8 weeks or if they cease to be members of the family of the deported person or if the deportation order made against the other person ceases to have effect,⁴⁸ or if they become patrials.⁴⁹

An appeal against family deportation must be lodged within two weeks from the date the Secretary of State notifies them of the decision of deportation⁵⁰ in writing and the Secretary of State cannot deport them then or while the appeal is pending.

Conducive to Public Good

A non-patrial can be deported from the U.K. if the Home Secretary deems the deportation to be conducive to public good.⁵¹ His power under this section has been variously described as being "without limit or definition"⁵² and as "giving him (the Home Secretary) almost unlimited power."⁵³ The rules provide that:

"the cases in which deportation is justified on the ground that it will be conducive to the public good are likely to continue to be few in number (and) judging from past experience, most of the cases in the category will be cases in which a court has convicted the person but has decided to leave the question of deportation to the Appeal Tribunal and the Secretary of State."⁵⁴

At the same time the Act itself provides that:

"a person shall not be allowed to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the U.K. and any other country or other reasons of a political nature."⁵⁵

The provisions above together reveal two kinds of deportation powers available to the Secretary of State although they are under one head. They are deportation conducive to the public good in general and deportation conducive to the public good on grounds of security and so on. Each of them will be analysed separately.

(a) General Deportation: Deportation of grounds conducive to the public good simpliciter gives the Secretary of State power to deport non-patrials whenever he deems it necessary in the interest of the public good. As the rules above state, the majority of the people to be normally affected by the deportation are those who have been

convicted by a court without a recommendation for deportation. Various cases show that the Secretary of State deports people on the above ground notwithstanding that they are deportable on other grounds. In the case of CSENYI v HOME SECRETARY⁵⁶ the appellant was convicted of an offence and recommended for deportation by a court of law having power to do so. The Secretary of State decided to deport him under the "public good" ground notwithstanding that he (the appellant) was deportable under "recommendation by a court" clause and in contravention of the rules above which state, in short, that the Secretary of State may exercise this power in cases in which a court has convicted a person but has decided to leave the question of deportation to the Appeal Tribunal and the Secretary of State i.e. cases in which there was a conviction but in which no deportation was recommended. The Tribunal upheld the decision without any comment.

In LONG v HOME SECRETARY⁵⁷ a deportation order was made under the conducive to public good ground because it came to light that the deportee had previous convictions abroad. This is a case in which no conviction by a court in the U.K. had been obtained. These two cases illustrate that the Secretary of State can deport a non-patrial under the public good ground when he chooses to do so. This kind of tendency makes the other grounds of deportation more or less superfluous particularly as the Tribunal will generally uphold the decision of the Secretary of State. Probably most deportations made on the public good ground are those in which a Court of law has convicted a person but left it to the Home Secretary to decide on the question of deportation. In this case the Home Secretary is not, apparently, bound by the observations of the court. In HELTIES v HOME SECRETARY⁵⁸ the appellant was convicted of theft by the Court which did not recommend his deportation because it considered that the offences were not serious enough to warrant such a recommendation and that he was unlikely to commit further offences. The Secretary of State in fact decided to deport the appellant under the conducive to the public good ground because he might commit further offences. The Tribunal upheld the Secretary of State's decision without any reference to the Court's prior decision. It is right that if further new evidence is made available to the Secretary of State and that evidence was not before the Court then the Secretary of State should deport

a person if he deems it necessary in the light of the new circumstances,⁵⁹ but where no such new evidence is available,⁶⁰ it is submitted that the Secretary of State should have no power to deport when the Court specifically considered deportation and refused to recommend it. If this is not so, that is, if the Court's role is only to return recommendations to deport then, the power to deport after a recommendation by a Court of law is superfluous and might as well be removed from the statute book. It is interesting in this respect that the Wilson Committee recommended the abolition of deportations following a recommendation by a court of law. Parliament decided, however, to retain it. If the scope of the power of the Secretary of State is as it appears to be in the above cases, then the Courts are in this regard a mere rubber stamp of convenience that is dispensed with as it suits the executive. It is submitted, however, that the actions of the Secretary of State in cases of this kind are probably illegal and they cannot stand the scrutiny of a court of law. An affected person should apply to a court of law for a review immediately as neither the Act nor the rules give him that power. L. Grant and J. Constable have submitted that mitigating circumstances proved at the trial of a person by a Court of law cannot be relied upon by the Tribunal unless they are proved afresh. Thus is STOFFLE v HOME SECRETARY⁶¹ where a charge of murder was changed to manslaughter, the Tribunal held that if the appellant's condition was to be put forward as constituting compassionate circumstances, it must be shown to be continuing at the time of the appeal. Under the rules⁶² the Tribunal, in considering whether deportation is the right course on the merits, must balance public interest against any compassionate circumstances of the case. If this rule is adhered to strictly one can foresee injustice caused in individual cases. An appeal against deportation on the ground of public good lies to the tribunal. Its decision is binding on the Home Secretary. But the Home Secretary's power to deport non-patrials on grounds of the public good is considerable as can be seen from the analysis above. In R.V. BRIXTON PRISON (GOVERNOR) ex parte SOBLEN [1962] 3 All E.R. 641 the Court of Appeal said that in exceptional cases the Courts might exercise some control over the power of the Home Secretary to deport people on grounds of public good, if, for example, there was a prima facie case of unlawfulness. However, the Court was under no

illusion that there are great difficulties in proving that the purpose of the Home Secretary in making a deportation on grounds of public good is unlawful. It is submitted that in all probability the courts power to exercise supervisory control over the Home Secretary's power of deportation on the ground of public good is more apparent than real.

(b) National Security: Deportation conducive to the public good as being in the interests of national security and so on is a power whose scope knows no limitation. The power under the 1971 Act was first exercised in the Franco Caprino case, an Italian Marxist who was resident in the U.K. in 1974. Public outcry was brought to bear upon the Home Secretary, Mr. Roy Jenkins (as he then was), as a result of which he revoked the order just before Caprino was due to appear before a security panel. In recent months the Home Secretary, Mr. Rees had exercised this power against two Americans, Mark Hosenball and Philip Agee. The scope of the power of the Home Secretary has been demonstrated by the two cases to be considerable and in its present form it is unquestionable. The Secretary of State is not at all obliged to give reasons for a deportation under this head.

If he decides to give reasons he is not obliged to give details. In the case of Mark Hosenball, the Secretary of State currently notified him that he was to be deported for unspecified security reasons, ie. that while he was resident in the U.K. in consort with others he sought to obtain and had obtained for publication information harmful to the security of the U.K. and that this information had included information prejudicial to the safety of Crown servants. Philip Agee, on the other hand, was told:

"he had maintained regular contacts harmful to the security of the U.K. with foreign intelligence officers; had continued to be involved in disseminating information harmful to the security of the U.K.; and had aided and counselled others in obtaining information for publication which could be harmful to the security of the U.K."

Pressed to say what these allegations meant the Home Secretary simply replied that because of the:

"security reasons involved I am not prepared to go into (any) detail." 63

A person deported in this manner under this head will never know the allegations made against him. The only option open to him or her is an appeal to the Home Office Advisory Panel. The Panel is not a statutory body as such and accordingly the appeal is non-statutory. A person who appeals to the Panel is not allowed legal representation, but to such an extent as the Panel sanctions, he or she may be assisted by a friend and arrange for third parties to testify on his behalf. The friend or third party may, of course, be a lawyer. But the person cannot be given reasons for his deportation by the Panel and he or she cannot cross-examine Government witnesses who, in fact, do not appear before the Panel. The Panel sits in private and the Press is excluded from the hearings. Neither the sources of evidence nor the evidence that might lead to disclosure of sources of evidence may be disclosed.

During the hearing of the "appeal" of Mr. Philip Agee there were confusions on the procedures to be followed and on whether or not the Panel had the right to give Agee details of the information they had received from the Home Office and the Security Service. Two former Home Office Ministers, Mrs. Judith Hart and Mr. Alex Lyon who came to testify for Mr. Agee insisted that the Panel had the power to do so, but the Chairman of the Panel said that the Home Secretary had decided against this.⁶⁴ After further consultation with the Secretary of State it transpired that the Panel can only decide points of procedure, such as who might attend the hearing but it was for the Home Secretary to decide how much information could be given. If this kind of procedure is followed it is doubtful whether the Panel can itself come to a fair conclusion. The practicalities of a particular case might demand the revelation of the very thing that the Home Secretary has refused to be revealed. In such circumstances it is impossible to testify on that point as the "deportee" is kept in ignorance of the facts of that point. It is not surprising in such circumstances that the Panel has been heard to complain that it was not satisfied with what it had been told before the hearing.⁶⁵ It is also a contradiction in terms to say that such a Panel is independent. Even its decisions do not and cannot bind the Home Secretary. What is its independence worth then?

Without objecting to the power to deport under this head, if one is to be reassured that the Secretary of State's decision to

deport is well founded, under the present system one cannot but totally agree with the submission that one must:

"assess the merits of the decision to deport... by reference to grounds for so deciding, or... must assume that judgement in such matters is inherently infallible, so that the grounds for deporting in the individual case are irrelevant. Clearly, such an assumption is wholly unacceptable..."⁶⁶

If an when the Secretary of State makes a deportation against a person under this head the person may appeal against the country specified in the removal directions on the ground that he sought to be removed to a different country. This is a statutory right.⁶⁷

A person who is refused entry into the U.K. on the ground that it is conducive to public good as being in the interests of national security and so on has no option of appeal to the non-statutory Panel.⁶⁸ He has no remedy.

It is submitted that the Secretary of State's power to deport non-patrials on the ground of national security is unlimited in scope. This may be compared with his power under the Immigration Appeals Act 1969. The 1969 Act had set up a special tribunal to hear cases of people deported on security grounds. In the DUTSCHKE CASE [1971] 34 M.L.R. 501 decided under the 1969 Act D. was not allowed to know the case against him and neither was his legal representative allowed to know the case against D. They were not allowed to cross-examine the Government witnesses who had given evidence of sensitive matters and their evidence was not included in the tribunal's report with the consequence that there was no revelation of the precise grounds of their decision. Therefore, the Secretary of State's power was largely as wide as under the 1971 Act.

Removal of Mental Patients

Section 30 of the Immigration Act gives the Secretary of State power to order the removal of non-patrials receiving treatment for mental illness as in patients if it appears to him to be in the interests of the patient to be so removed.⁶⁹ The only requirements on the Secretary of State are that he must be satisfied that proper arrangements for the removal of the patient to his country have been made and that either he or one of his under-secretaries signs the removal order.⁷⁰ The methods used to detain patients in mental

hospitals are all detailed in the Mental Health Act⁷¹ but it must be mentioned that the Act offers a wide scope for abuse of the powers⁷² and, accordingly, the powers of the Secretary of State under this head are considerable. There is no appeal against the removal provided for by the Immigration Act.

Voluntary Return or Repatriation

The Secretary of State has power under the Immigration Act to make payments of such amount as may be determined to meet or provide for the expenses of non-patrials leaving the U.K. for a country where they wish to reside permanently. The Secretary of State can only do so, however, with the approval of the Treasury.⁷³ Further, before the Secretary of State can so make the payments, it must be shown that so far as is practicable it is in the interest of that person to leave the U.K. and that he wishes to do so.⁷⁴

Apart from the provisions above there is no guidance of how the Secretary of State may exercise the power. How, for example, does he satisfy himself that it is in the interest of the person to leave the U.K., or how does he reach the conclusion that a person wants to leave the country voluntarily? It is submitted that people seeking this kind of help will be incapable of supporting themselves in the first place. It may well be that it will be in the interests of this person to leave the U.K., but to say that a person in such a desperate condition made his choice freely seems to beg the question.

Suppose also that after the request for the help the person changes his mind to leave. Will he or she be allowed to retract the former decision? This is a virgin area and with no rules or precedents it is impossible to say the exact scope of the power of the Secretary of State although it is thought to be considerable. It must be noted that if the person who so wishes to leave and has a family that wants to leave with him, the Home Secretary can also pay them.⁷⁵ This may, in some cases, include patrial children.

It is stated that anyone who receives assistance from the public funds towards the cost of leaving the U.K. will not be readmitted.⁷⁶ This seems to imply that a patrial child, for example, will be deprived of the right of abode if he or she has his or her expenses paid for by the state to leave the U.K. because his or her

parents want to leave the U.K. with him or her "voluntarily". It is hoped that this implication will be eschewed as it will otherwise have serious unlawful repercussions.

General Points

Before concluding ^{on} deportations a few things must be noted. Firstly, once the Secretary of State has taken a decision to deport he has power to make a detention order pending an appeal⁷⁷ but subject to a right of appeal to the appellate body to grant bail provided an appeal against the deportation order itself can and has been lodged.⁷⁸ This provision is likely to work hardship to people deported on grounds conducive to public good as being in the interests of national security and so on. If the Secretary of State decides to detain them it means that they have no remedy under the Immigration Act and they will be, thereby, prevented from preparing their dossiers and organising their witnesses should they decide to appeal to the Panel. This power must be exercised, if at all, with the utmost reluctance.

Secondly, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion.⁷⁹ In ALI v IMMIGRATION APPEAL TRIBUNAL AND OTHERS⁸⁰ the court of Appeal ruled that:

"in all...cases the proper person to consider a claim to political asylum is the Home Secretary.

If a man has well-founded fear of being persecuted if he is sent back to his country, he should make representations to the Minister and the Minister will take that fear into account in determining whether to make a deportation order."⁸¹

It follows from the decision that only the Secretary of State has the power to grant political asylum. That being so it also follows that he can overrule the decision of a court that recommends a deportation but makes a finding that the person is likely to be persecuted if sent back to his country.

Thirdly, the husband of a woman who is settled in the U.K. or is on the same occasion being admitted for settlement is himself to be admitted for the purpose of settlement if he holds a current

entry clearance granted to him for that purpose.⁸² Such a man is not free from deportation until he acquires the right of abode through naturalisation or registration as a U.K. citizen. In one case,⁸³ which is not a very good example, a man was refused an extension of leave to stay by the Secretary of State. He then entered into a marriage with a woman settled in the U.K. It was held that the marriage was a device to remain in the U.K. and accordingly he was deported.

Lastly, exemption from deportation does not of itself confer on people who have been ordinarily resident in the U.K. (eg. Commonwealth or Irish citizens who are ordinarily resident) patriality or settlement until they qualify as such. A Commonwealth or Irish citizen who, therefore, has been ordinarily resident in the U.K. qualifies as "settled" if there are no restrictions on the period for which he may stay. If this restriction is not removed then he is trapped in the U.K. in that if he were to leave he would have to qualify for re-admission in the same manner as any other entrant.⁸⁴

(B) KENYA:

In Kenya, the power to deport a person is generally vested in the Minister for Home Affairs as in the U.K. In Kenya, however, only non-citizens of the country may be deported unlike the U.K. where a citizen of the U.K. and colonies may be deported if he is not a patrial. The power to deport a person in Kenya emanates entirely from the Immigration Act.⁸⁵ This contrasts with the U.K. where deportation under the 1971 Immigration Act exists side by side with prerogative powers of deportation.

Section 8 of the Immigration Act⁸⁶ provides that:

"the Minister may, by an order in writing direct, that any person whose presence in Kenya was, immediately before the making of that order unlawful shall be removed and stay out of Kenya either indefinitely or for such period as may be specified in the order."

A person is unlawfully present in Kenya if he is a prohibited immigrant⁸⁷ or being a holder of a class K or L entry permit (discussed later) he fails to engage in the occupation, trade, business or profession for which the entry permit was issued within 14 days from its date of issue or entry into Kenya, whichever is the

later⁸⁸. Finally a person is unlawfully present in Kenya if his entry into and stay in Kenya was without a valid entry permit or a valid pass.⁸⁹ Each of these will now be examined.

Section 3 of the Immigration Act gives an exhaustive definition of a prohibited immigrant. It is a person who is not a citizen of Kenya and who is:

(a) incapable of supporting himself and his dependants, if any, in Kenya. At present there are no criteria of how an immigration officer arrives at the decision on whether or not a person can support himself and his dependants, if any. However, a person with a work permit will generally fall outside the reach of this provision. Since the entry and stay of a non-citizen in Kenya is at the discretion of an immigration officer it is arguable that the amount of money an immigration officer thinks sufficient before a person qualifies as self-supporting is arbitrary.

In the U.K. a person who cannot support himself or his dependants may leave voluntarily although that does not exclude the possibility of him being pressed to so leave by the Government.

(b) a mental defective or a person suffering from mental disorder. This may be quite easy to establish medically.

(c) a person who:

(i) refuses to submit to medical examination by a medical practitioner after being required to do so or

(ii) is certified by a medical practitioner to be suffering from a disease which makes his presence in Kenya undesirable on medical grounds.

The clause above if literally applied may have the effect of enabling immigration authorities to require a person who refuses to be examined on religious or other grounds to leave Kenya. The clause should not, therefore, be applied loosely as it otherwise endangers the loss of a person's freedom of movement by reason of his beliefs which may be a greater loss than the danger it is intended to prevent if he is required to leave the country.

Suppose a person who is examined is found to have a venereal disease. Is it proper that he be required to leave the country on that account if, say, the disease itself is common in the country? It is submitted that in its present form the clause can be used to deport a non-citizen who is found to have any disease since it has

not been clear which diseases are undesirable for immigration purposes and which are desirable for immigration purposes. It would help, therefore, if a list of the undesirable diseases was made.

(d) a person who, not having received a free pardon, has been convicted in any country, including Kenya, of murder or of any offence for which a sentence of imprisonment has been passed for any term and who by reason of such conviction is considered to be an undesirable immigrant. This provision makes no distinction between minor offences and serious offences and accordingly a person may find himself deported from the country for a very minor offence. The U.K. law is very clear on this particular point in that it not only lists the types of offences, but in fact also excludes the wife and children under 18 years of a person settled in the country from the purview of the provision. In contrast the Kenyan law is silent on the kind of offences that will qualify one as an undesirable immigrant. It is also clearly silent on whether or not it applies to all non-citizens irrespective of their connections with the country. In that case, it may be argued that either it applies to all non-citizens irrespective of their connections or that it is capable of being manipulated so as to apply to all non-citizens.

(e) a prostitute or a person who is living on or receiving or who before entering Kenya lived on or received the proceeds of prostitution. This provision has the effect of barring from Kenya people who practise prostitution or who live on its proceeds and people who practised prostitution or lived on its proceeds in the past. The fact that a non-citizen may have ceased to engage in prostitution or receiving proceeds of prostitution does not remove him or her from the consequence of deportation from Kenya. Presumably a finding that one is a prostitute or received the proceeds of prostitution is based on the elements of continuity and regularity with a pattern of behaviour or deliberate course of conduct entered into primarily for gain or for other considerations of material value as distinguished from the commission of casual and isolated acts.⁹⁰ If this is so it means that a woman who engages in occasional and isolated acts of prostitution does not come under the purview of this provision.

(f) a person who in consequence of information received from any government or from any other source considered by the Minister

to be reliable, is considered by the Minister to be an undesirable immigrant. This power has been used on several occasions. For example, on July 5th, 1967 the Minister for Home Affairs deported from Kenya 5 Europeans and 7 Asians on the ground that they were undesirable immigrants.⁹¹ The Minister's power is comparable to that of the U.K. Home Secretary to deport on grounds conducive to the public good.

(g) a person or a member of a class of persons whose presence in Kenya is declared to be contrary to the national interests. This power contrasts with the one available to the U.K. Secretary of State to deport a non-patrial on grounds conducive to the public good as being in the interest of national security. It is obvious that the power of the Minister is co-extensive with that of the Secretary of State save for the fact that in the U.K. the advice of the non-statutory independent Panel is obtained first.

The power to declare a non-citizen a prohibited immigrant is exercised by the Minister for clauses (d) to (g) above. An immigration officer may do so provided consent has been obtained from the Minister first.⁹² In this case an immigration officer's exercise of the power is no more than a piece of administrative machinery.

(h) a person who, upon entering or seeking to enter Kenya, fails to produce a valid passport to an immigration officer on demand or within such time as that officer may allow. For the purposes of a passport the production of a valid travel document or document of identity issued to the person by an authority recognised by the Government of Kenya is sufficient.⁹³

(i) a person who was immediately before the commencement of the Immigration Act 1967, a prohibited immigrant under the 1956 Immigration Act.

(j) a person whose presence or entry into Kenya is unlawful under any written law other than the Immigration Act 1967.

(k) a person in respect of whom there is in force an order made or deemed to be made under s. 8 of the Immigration Act 1967, directing that such person shall be removed from and remain out of Kenya. S. 8 of the Act covers all the above categories of prohibited immigrants who have been served with notices by the Minister that their presence in Kenya is unlawful. It also covers any person

against whom a recommendation has been made under the Kenyan Penal Code, ie. any person who has been convicted and recommended to be deported by a court of law. This power is exactly like that available to the U.K. Secretary of State and, accordingly, a recommendation for deportation by the court does not bind the Minister to act in accordance with it. He can ignore the recommendation or effect it, as he thinks fit. This may well represent an aspect of the sovereignty of state.

Finally, a member of the family of any prohibited immigrant is also a prohibited immigrant and can, accordingly, be deported by the Minister from Kenya.⁹⁴ Although the power of the Minister to deport a member of a family of a prohibited immigrant is like that of the Secretary State to deport the wife and children under the age of 18 years of a deported person, it is submitted that the Kenyan Minister has more power in that he can deport any dependant of the prohibited immigrant. For this reason it does not matter that the dependant is not the wife or or child under 18 years of the prohibited immigrant. The important thing is that as long as any person is a dependant of the prohibited immigrant, he or she is also a prohibited immigrant and, therefore, deportable. A dependant is any person in respect of whom a dependant's pass is issued by reason of:

(i) his or her dependence on the prohibited immigrant for maintenance or

(ii) his or her age, disability or any incapacity and is unable to maintain himself adequately or for some other reason relies on the prohibited immigrant for maintenance.⁹⁵

By the nature of the definition of a dependant it is, therefore, open to the Minister to deport not only the wife and children under the age of 18, but also any person who is dependent on the prohibited immigrant as above. This gives the Kenyan Minister more power than the U.K. Secretary of State. If a dependant also holds an entry permit then it is possible that he or she does not come under the purview of the provisions above although the person on whom he or she is or was dependent becomes a prohibited immigrant.

The second category of persons who are considered unlawfully present in Kenya is in any case in which the holder of classes K and L entry permits (discussed later) has failed to engage within 14 days from the date he got the entry permit or of his entry into

Kenya, whichever is later, in his employment, occupation, trade, profession or business without the permission of the immigration officer.⁹⁶ He will also be unlawfully present in Kenya if he deliberately ceases to engage in that employment or occupation and so on without the permission of an immigration officer.⁹⁷ In either case, once he becomes unlawfully present in Kenya he is automatically liable to be served with a notice for removal from the country.

Finally a person is unlawfully present in Kenya if his entry and presence in Kenya is or was done without a valid entry permit or valid pass.⁹⁸ In that case, he is also automatically liable to be served with a removal order by the Minister.

Any person who is unlawfully present in Kenya and has been served with a deportation or removal order from the Minister shall be removed to the country whence he came.⁹⁹ In some cases, the person may, with the approval of the Minister, be removed to a place in the country to which he belongs, i.e. the country of which he is a national, if he did not come from there. He may also be removed to a place to which he consents to be removed provided the permission of the Minister is obtained in the first place. In this case, he must, however, show that the Government of the country to which he wishes to go consents to receive him.¹⁰⁰ The same discretions are available to the U.K. Secretary of State also.

If the Minister so directs, a person who is subject to a deportation order shall be kept in prison or in police custody until his departure from Kenya is effected.¹⁰¹ However, while so kept he shall be deemed to be in lawful custody.¹⁰² These provisions exclude the possibility of the availability of an habeas corpus and probably bail. In contrast, in the U.K., a person so detained can seek bail and, in some cases, habeas corpus.

A removal order remains in force until it has been revoked by the Minister. A person who, therefore attempts to enter Kenya while he is subject to a removal order that has not been revoked will be prosecuted.¹⁰³

The Minister reserves the discretion to revoke or vary a removal or deportation order at any time and in any way.¹⁰⁴

Immigration officers have power to order the removal of a person who arrives in Kenya as a stowaway from the country.¹⁰⁵ Their power is absolute and cannot be questioned by any court of law.

In all other cases it is only the Minister for Home Affairs who has the power to order the removal of non-citizens from Kenya on the ground that they are unlawfully present in Kenya for any of the reasons already discussed.

Finally, it must be submitted ^{that} the U.K. immigration law, although much criticised, gives far more protection to a non-patrial from deportation than does the Kenyan immigration law to non-citizens. One can hardly avoid the conclusion that the Kenyan Immigration Act is an attempt to legitimise and entrench the extensive powers of deportation in the hands of the Minister.

FOOTNOTES
(Chapter 1(iv))

1. In SCHMIDT v HOME SECRETARY [1969] 2 W.L.R. 337 at 351-352. Widgery L.J. (as he then was) noted that there was some difference of opinion as to the right to deport an alien already in the country by virtue of prerogative powers. But see Blackstone Commentaries i, 252, where it is said that friendly aliens are liable to be sent home whenever the King sees occasion. Cf. A.G. FOR CANADA v CAIN and A.G. FOR CANADA v GILHULA (1906) A.C. 542 (P.C.) where it was noted by the Privy Council that one of the rights possessed by the supreme power of every state was to expel or deport, from the state, at pleasure, even a friendly alien.
2. Immigration Act 1971, s. 7(1)(a).
3. I. Macdonald, p. 107.
4. A.D. MEHMET ex parte HOME SECRETARY, The Times, December 15, 1976 p. 13.
5. [1973] 2 All E.R. 765.
6. H.C. Deb. April 11, 1974, vol. 872, col. 637-638.
7. [1969] 2 W.L.R. 337 per Widgery L.J., pp. 350, 351-352.
8. See SCHMIDT v HOME SECRETARY [1969] 2 W.L.R. 337 per Lord Widgery generally; cf. Blackstone's Commentaries i, 252.
9. Immigration Act 1971, s. 3(1)(b) and (c).
10. H.C. 80 (1973) para. 44 and H.C. 82 (1973) para. 49.
11. Immigration Act 1971, s. 3(5)(a).
12. A.D. MEHMET ex parte HOME SECRETARY, The Times, December 15, 1976.
13. ISLAM v HOME SECRETARY [1975] Imm. A.R. 106.

14. "A man is free to stay and starve, but not to take another job without the knowledge of the Home Office". I. Macdonald p. 101.
15. SUTHENDRAN v IMMIGRATION TRIBUNAL [1977] A.C. 359 (H.L.)
This has now been changed by Statutory Instrument 1572 of September 22, 1976 which says that the duration of leave to stay (except in certain specified cases) is to be extended until the expiration of the 28th day after the date of the decision of the Home Office on the application for extension of leave to stay.
16. HOME SECRETARY v ALUKO [1974] Imm. A.R. 90 and ISLAM v HOME SECRETARY [1975] Imm. A.R. 106.
17. [1974] Imm. A.R. 90.
18. [1975] Imm. A.R. 75.
19. Ibid. p. 78.
20. Immigration Act 1971, s. 18.
21. A.D. MEHMET ex parte HOME SECRETARY, The Times, December 15, 1976.
22. Immigration Act 1971, s. 3(6).
23. In R. v ASSA SINGH [1965] 2 QB 312 the Court of Criminal Appeal held that the trial judge should pass sentence whether or not he is to recommend the convict for deportation.
24. H.C. 80 (1973) paras. 40 and 41 and H.C. 82 (1973) paras. 47 and 48.
25. J.M. Evans p. 103.
26. H.C. 82 (1973) para. 47.

27. J.M. Evans p. 114 note 24.
28. [1975] Imm. A.R. 92.
29. Immigration Act 1971, s. 6(2).
30. Ibid.
31. But there is an appeal against the destination.
32. Immigration Act 1971, s. 6(5)(b).
33. Ibid. s. 3(5)(c).
34. H.C. 80 (1973) paras. 44-48 and H.C. 82 (1973) paras. 51-55.
35. Ibid.
36. Immigration Act 1971, s. 5(4).
37. H.C. 80 (1973) para. 46 and H.C. 82 (1973) para. 53.
38. Re MADANAYAKE 264/74 (275) unreported.
39. Re FOWDOUR 1385/74 (281) unreported.
40. Ibid.
41. Immigration Act 1971, s. 5(4)(b).
42. Ibid.
43. Children born in the U.K. are patrials unless they are children of enemy aliens or foreign diplomats.
44. H.C. 80 (1973) para. 47 and H.C. 82 (1973) para. 54.
45. H.C. 80 (1973) para. 48 and H.C. 82 (1973) para. 55.

46. Immigration Act 1971, s. 5(3).
47. The Times, December 15, 1976.
48. Immigration Act 1971, s. 5(3).
49. Ibid. s. 5(2).
50. Immigration Appeals (Procedure) Rules para. 4(7).
51. Immigration Act 1971, s. 3(5)(b).
52. I. Macdonald p. 101.
53. L. Grant and J. Constable, 1975 vol. 125, New Law Journal, p. 981.
54. H.C. 80 (1973) para. 43 and H.C. 82 (1973) para. 56.
55. Immigration Act 1971, s. 15(3).
56. [1975] Imm. A.R. 92.
57. 1883/72 (37) unreported.
58. 3539/73 (206) unreported.
59. If there is new evidence should it be made available to the Court for the purpose of considering whether to make a recommendation for deportation? If this were the case then it would be a means of testing the new evidence. This opportunity may be available in an appeal to the tribunal.
60. ECKSTEIN v SECRETARY OF STATE FOR THE HOME DEPARTMENT 2500/71 unreported.
61. 122/72 unreported.

62. H.C. 80 (1973) para. 38 and H.C. 82 (1973) para. 45.
63. The Times, November 19, 1976 p. 12.
64. Ibid, January 12, 1976 p.2.
65. Ibid.
66. 1976 vol. 126 New Law Journal p. 1.
67. Immigration Act 1971, s. 17(3).
68. The Times, November 19, 1976 p. 2.
69. Immigration Act 1971, s. 30(2).
70. Mental Health Act 1959, s. 146.
71. Ibid.
72. Immigration Act 1971, s. 29(1).
73. Ibid.
74. Ibid. s. 29(2).
75. H.C. Official Report S.C.B. 25th May, 1971 col. 1303.
76. Cmd. 4606, rule 50.
77. Immigration Act 1971, schedule 2 para 2(2).
78. Ibid. Schedule 2 para 29(1).
79. H.C. 80 (1973) para 50 and H.C. 82 (1973) para 28; Immigration Act 1971, s. 17(1).
80. [1973] Imm. A.R. 33 C.A.

81. Ibid. p. 35.
82. Cmd. 5715, para. 47.
83. ABDELLATIF v HOME SECRETARY 1582/75 436 unreported.
84. L. Grant and J. Constable, 1975, vol. 125, New Law Journal p. 957.
85. Immigration Act 1967 generally.
86. Ibid. s. 3.
87. Immigration Act 1967, s. 3(2).
88. Ibid. s. 6(1) and (2).
89. Ibid. s. 4(1) and (2).
90. This is the case in the U.S.A. : F.L. Auerbach, p. 200.
91. Kenya National Assembly Debates vol. XII July 6, 1967 cols. 1870 - 1872. Note that the Vice-President said he had previously made a number of deportations.
92. ODENDAAL v GRAY [1960] E.A. 263 C.A.
93. Immigration Act 1967, s. 2(c).
94. Ibid. s. 3(1).
95. Legal Notice 235 para. 15(2)(a) and (b).
96. Immigration Act 1967, s. 6(1) and (2).
97. Ibid.
98. Ibid. s. 4(1) and (2).

99. Ibid. s. 8(2)(a).

100. Ibid.

101. Ibid. s. 8(2)(b).

102. Ibid. For discussion on this see Chapter 5.

103. Ibid. s. 8(7).

104. Ibid. s. 8(4).

105. Ibid. s. 8(5).

CHAPTER TWO

THE PURPOSE OF IMMIGRATION LAWS IN THE UNITED KINGDOM AND KENYA

In this chapter a brief attempt will be made to analyse the purposes of immigration laws in both countries. Although one may disagree with the intent of the immigration laws discussed hereunder, one cannot disagree with the fact that their effects have had disturbing overtones. To talk of intent and effect is not to confuse cause with effect. It is the assertion of this thesis that the root of the immigration laws in both countries is the same. The differences lie in the means adopted by both countries and the effects of their respective immigration laws.

The United Kingdom

The enactment of the 1971 Immigration Act was the culmination of a number of policies that successive British Governments had pursued for some time. The policies may be summed up in one word, namely, restrictiveness, which itself reflected the transition of the U.K. from a laissez-faire world power to a state in a world of states.

What was the purpose of adopting the restrictive measures?

(a) Numbers:

The 1962 Commonwealth Immigrants Act placed controls upon immigration from Commonwealth countries by bringing under immigration control all British subjects, citizens of the Republic of Ireland and British protected persons unless they were both in the U.K. or unless they were citizens of the U.K. and colonies who held U.K. passports.¹

Paul Foot traced the political origin of the 1962 Act to the political campaign mounted both outside and inside Parliament to restrict numbers of non-white British subjects coming into the U.K.² Although the 1962 Act placed no limit on the number of immigrants to be allowed into the U.K. immigrants were to be admitted on one of the three kinds of vouchers; that is to say:

(i) Category A - it was for Commonwealth immigrants with a specific job to come to; the employer had the mandate to issue the voucher,

(ii) Category B - these vouchers were issued by the British High Commissions in Commonwealth countries to people with skills or qualifications not available or not in sufficient numbers

in the U.K. labour market, and

(iii) Category C - these vouchers were free for all on a first come first served basis with priority to people who were in the war service.³

The dependants of voucher holders were free to join their voucher-holding family members in the U.K. The 1962 Act suffered in one basic respect. It did not keep an accurate record of the number of immigrants that came to the U.K. Moore and Wallace have said that

"the 'take-up' rate (the ratio of vouchers used to vouchers issued) varied from place to place and according to political circumstances."⁴

It is because of this lack of accurate checks on numbers of immigrants entering into the U.K. that in 1965 the Prime Minister's office issued a White Paper on Immigration from the Commonwealth to restrict the number of vouchers to 8500 a year (including 1000 for Malta); to terminate the entry of unskilled persons (holders of Category C vouchers) into the country; to apply stricter controls on students, visitors and 16 to 18 year old dependent children; and to take more effective measures to prevent illegal entrance.⁵ The fear of numbers of immigrants from the Commonwealth countries was a cancerous nightmare that ate into the British public mind with great intensity. It was so intense that in 1967 when the Kenyan Government clamped down on non-citizen British Asians then resident in the country, ^{there} was an ominous cloud of a massive flow of these British citizens into the U.K. The Labour Government spared no time in introducing the Commonwealth Immigrants Bill 1968 which was swiftly pushed through Parliament. The Act ^{covered} brought all the Commonwealth citizens, whether or not they held U.K. passports if neither themselves nor one of their parents or grandparents could claim birth in the United Kingdom, naturalisation in the U.K. or citizenship by registration under the British Nationality Acts of 1948 and 1964. Most of the East African Asians, who were generally British passport holders, did not and could not satisfy these onerous conditions which were deliberately inserted to stop their influx into the United Kingdom. The Act also limited the right of entry of children under 16 years to those joining both parents or a surviving parent and withdrew the entry rights of student's dependants. The East African Asians were to receive an extra annual allocation of 1500 vouchers together with

their dependants over and above those that were allotted to Commonwealth citizens.

The most significant effect of this 1968 Act was, according to J.M. Evans:

"that it removed the right of entry from citizens of the U.K. and colonies, even though they had no other citizenship and had no legal claim to remain where they were, because the territory from (sic) the connection with which their citizenship sprang had lost its colonial status."⁶

During the passing of the bill, Lord Gardner estimated that 2.4 million citizens of the U.K. and colonies were exempt from the 1962 Act but would fall within the proposed measure.⁷ And as recently as in 1975 it was estimated that there are 45,000 U.K. passport holders with no other citizenship in East Africa alone.⁸ It is, in fact, the latter figure of the East African Asians from Kenya that galvanised the whole British thinking on matters of immigration from abandoning its legal obligations to its citizens abroad to imposing restrictive measures to control their 'inflow' into the U.K. It may well be, as Roy Jenkins said in 1967 in his capacity as the Home Secretary, that the policy was to

"contain the flow of immigrants within our economic and social capacity to absorb them,"⁹

but it has never been doubted that the Act was intended to abate the increase of Commonwealth citizens into the U.K. in the first place.

Under the European Convention on Human Rights, of which the U.K. is a member is set up a European Commission¹⁰ with a provision that member states are to recognise the right of individuals to petition the Commission.¹¹ In one of its deliberations it had occasion to comment on the 1968 Commonwealth Immigrants Act of the U.K. A case had been brought by C.P. PATEL¹², a British passport holding Asian from East Africa alleging the contravention of Article 14 of the convention which provided that the rights and freedoms set forth in the convention are to be secured

"without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission found as a fact that the U.K. Government had:

"not disputed that the object of the 1958 Act was to exclude more than a limited number of East African Asians from entering the U.K. and further that the Act was directed against citizens of the U.K. and colonies resident in East Africa ..."¹³

Thus, the Immigration Acts leading up to the 1971 Immigration Act were aimed at reducing the inflow of immigrants into the U.K. The 1971 Immigration Act which is a codifying Act may be termed as the high water mark of the crystallization of the restrictive policy to keep numbers of immigrants into the U.K. low. By introducing the term 'patrial' the Act permanently brought down the inflow of Commonwealth citizens and citizens of the U.K. and colonies born, naturalised, registered or adopted outside the U.K. and without a parent or a grandparent who was so born, naturalised, registered or adopted under the immigration control.

The theme of numbers has been a recurring one over the years, therefore. There is no doubt that it forms a major part of the U.K. immigration policy. Recently, the Franks Committee was set up to consider the possibility of a register of the dependants of immigrants still abroad. The Committee was set up as a result of open fears that the pool of the immigrants' dependants is infinite and it was hoped that by preparing a register of dependants it would be demonstrated that the number of dependants was, in fact, finite. This would have put the public fear to an end. However, the Home Secretary rejected the preparation of such a register saying that it would be:

"impracticable and undesirable as a means of relieving widespread anxieties about the numbers entitled to come to Britain in the years ahead."¹⁴

The problem of numbers is, therefore, a very live one and it will remain for a long time.

One of the contradictory consequences of the introduction of the term 'patrial' is that it gives the right of entry and stay in the U.K. to millions of people from Australia, Canada, Rhodesia, and New Zealand who did not have the right of free entry since 1962. The only thing that they must satisfy, if they are not citizens of the U.K. and colonies is that at least one of their parents or

grandparents was a citizen of the U.K. and colonies by birth, registration, naturalisation or adoption in the U.K.

Secondly, there is no restriction on the number of people who come from the Republic of Ireland.¹⁵ Both of these form a large number of people that are eligible to come into the U.K. although they may not be citizens of the U.K. Accordingly, a large number of U.K. nationals is, by the device of immigration law, prevented from freely coming and settling in the U.K.

The concern with the numbers of immigrants coming into the U.K. in the 1971 Act is in no way new. The 1905 Aliens Act was a response to the great number of East Europeans coming into the U.K. The 1962 Commonwealth Immigrants Act was, according to Lord Diplock:

"to enable the Secretary of State to limit the numbers of Commonwealth immigrants entering (the) U.K. It was general public knowledge in 1962 that the problem was one of numbers."¹⁶

Indeed, it was only in line with the existing judicial attitude when in 1974 the Master of the Rolls himself said:

"Take the class of persons with whom we are concerned - British protected persons. They are said to be British nationals..they are not British subjects. These number, or used to number, many millions...Is it to be said that by international law every one of them has a right ...to come into these small islands? Surely not. This country would not have room for them. It is not as if it was only one or two coming. They come not in single files, but in battalions"¹⁷

(b) Racial Tension:

It has been said that racial feelings, albeit latent, have been a feature of antiquity in Great Britain.¹⁸ It is not until 1958, however, that these racial feelings came to the surface following the Nottingham and Notting Hill racial disturbances. So when in 1962 the Commonwealth Immigrants Bill was introduced in Parliament one M.P. complained that:

"The Bill's real purpose was to restrict the influx of coloured immigrants. We were reluctant to say as much openly. So the restrictions were applied to coloured...citizens in all Commonwealth countries - though everybody recognised that immigration from Canada, Australia and New Zealand formed no part of the problem."¹⁹

If the 1962 Act was not so open the 1968 Commonwealth Immigrants Act left no doubt in the minds of many that it was 'racist' in its consequences if not in intent. It was argued with passionate force that cities congested with coloured immigrants were going to be breeding grounds of racial violence and tension and in order to avoid this, effective curbs had to be brought into force before the advent of racial violence.²⁰ Also the European Commission on Human Rights has found the U.K. guilty of discriminatory treatment against the East African Asians on grounds of race.²¹

If the previous 1962 and 1968 Acts were not openly expressive of their racial consequences then the 1971 Immigration Act left no doubt about this at all. Moore and Wallace have asserted that:

"the 1971 Act extended and formalised the racial basis of immigration legislation."²²

The introduction of the term 'patrial' was viewed as racist in that citizens of certain Commonwealth countries, like Canada, Australia and New Zealand could come and settle in the U.K. without any problems because most of them had 'close connections' with the U.K., whereas coloured Commonwealth citizens automatically became non-patrials with the consequence that their entry and stay in the U.K. was subject to immigration control. Moreover, the Act deliberately exempted citizens of the Republic of Ireland from control although Ireland was not a Commonwealth member. This exemption carried racial overtones in spite of the economic, historical and geographical reasons that have already been looked at. The Government tried to defend its stand that the 1971 Act was not racial. In a reply, Mr. Maudling said that:

"it must be nonsense to say that because you recognise a family connection and your family happen to be the same race as you, you are being a racialist."²³

But Mr. Powell shed more light on the Act when he said that:

"there is not the slightest doubt that the practical effect of patriality is to distinguish between persons holding the same citizenship status on lines which happen to coincide with what we roughly call 'race'."²⁴

It may well be that that Act recognises 'blood connections' and that does not necessarily make it racial. But this must not be

confused with the clear intention of the Act which was to control the immigration of coloured immigrants into the U.K. as a means of improving racial relations or, in the words of Reginald Maudling, "community relations".²⁵

The most significant issue touching all the 1962, 1968 and the 1971 Acts is that immigration law in the U.K. moved from the 'contractual' concept of citizenship to the 'organic' concept (ie. recognising only blood relationship) of citizenship. The effect of this movement has been to deny citizenship and immigration rights of stay and entry into the U.K. to coloured people with a stake in the country. The unfortunate consequence is that a wave of Racial attitude in the Immigration Acts is felt increasingly each time.

(c) Traditional Purposes:

Immigration law has, from the early times, been concerned with the control and discipline of immigrants and also with the concern that immigrants must not come to the U.K. and depend on its social welfare benefits or if they are undesirable. For example, the 1905 Aliens Act placed control on certain undesirable classes and these included prostitutes, persons living on the proceeds of prostitution, persons who were likely to be a charge on public funds having no visible or probable means of support and persons of notoriously bad character.²⁶ The 1971 Immigration Act continues the same practices although it has raised the status of immigrants in that there are now substantial rights of appeal under it. The basic objection to the 1971 Act, in this respect, is that it gives a discriminatory presumption that coloured people belong to the undesirable classes as a result of the use of the term patrial. The present Immigration Rules provide that immigration officers shall do their work without discrimination on the grounds of race, colour or religion and the Rules are themselves to be framed on this basis.²⁷ I. Macdonald rightly submits that:

"an amendment saying that rules are not to discriminate makes nonsense within the discriminatory framework of the Act. But, obviously, it might give the High Court or an Immigration Tribunal, which was hostile to the spirit of the Act, ^{a convenient weapon} with which to attack its basic assumptions either...by declaring the rules ultra vires and void or by admitting in a particular case someone whom the immigration authorities would wish to exclude."²⁸

Kenya

(a) Africanisation:

The Vice-President and Minister of Home Affairs, when introducing the Second Reading of the 1967 Immigration Bill complained that the Act then in force (1956 Act):

"did not give him power to control employment of non-citizens once they have qualified for a resident's certificate."²⁹

Under the 1956 Immigration Act a person who qualified for a work permit could not be removed from his employment, occupation, trade or profession and so on afterwards. With the mounting pressure for 'Africanisation' the Government sought to change all this by giving the Minister of Home Affairs power to control the entry, stay and removal of all immigrants (non-citizens) and thereby allowing the Government to give skilled Kenyans jobs that were held by non-citizens. The 1967 Act was, therefore, specifically intended to facilitate the Government's policy of 'Africanising' the economy.

'Africanisation' is not a legal term. It is capable of many meanings³⁰ but, the Courts have said that it applies to all citizens of Kenya irrespective of their race or colour. In SHAH DEVSHI v TRANSPORT LICENSING BOARD³¹ it was held that to refuse a company a license on grounds that it has not 'Africanised' its staff was discriminatory on grounds of race and contrary to the constitution. In this case, members of staff of the Shah Devshi Company were mostly of Asian origin although they were Kenyan citizens. The Licensing Board refused to renew the company's licenses because in its view the company had not employed enough people of African descent. This is not the legal meaning given to the term 'Africanisation' by the Courts. The Court was, therefore, of the view that 'Africanisation' must be afforded to all Kenyan citizens regardless of their colour or race. This is absolutely right.

In an important constitutional ruling the Speaker of the National Assembly said during a debate that:

"if Honourable members have not meant Kenya-nisation (when talking of 'Africanisation') then they were contrary to the Constitution"³²

In common legal parlance the word 'Africanisation' means affording different treatment to non-citizens of Kenya vis-a-vis

citizens regardless of their colour, origin or race.

Having seen the legal meaning of Africanisation, the essence and role of the policy must now be assessed in relation to immigration law. In 1967 27% of all posts in the public sector and more than 47% of all posts in the private sector were held by non-citizens.³³ This was a particularly significant improvement compared with the 1964 period when more than 41% of all posts in the public sector and 53% of all posts in the private sector were held by non-citizens.³⁴ These high figures were disconcerting to the public and embarrassing to the Government for which it often came under severe criticisms inside and outside Parliament. This was understandable in view of the fact that independence had been looked upon as "implying a new emphasis upon African participation"³⁵ in all the sectors of the economy. There was, therefore, a general sense of frustration in the pre-1967 period in the public mind with dire repercussions on the stability of the country.³⁶ In the light of this situation one may be inclined to agree with D. Rothchild that:

"Africanisation is a logical and not a vengeful policy."³⁷

The combined effect of a large percentage of non-citizens holding jobs in Kenya and the fact that once a non-citizen got a resident's certificate he could not be removed from his job was to force the Government, which was already under tremendous pressure, to change its immigration policies. A complete overhaul of the previous Immigration Act was, therefore, necessary. The 1967 Act made it an offence for anyone who is not a citizen of Kenya to enter or remain in Kenya without a valid entry permit or valid pass. An entry permit is by its very nature a work permit. Twelve classes of entry permits were created (they are now 13 classes) and all people with resident's certificates were to remain in Kenya by virtue of their previous certificates as long as the Minister had not exercised his discretion to cancel them.

It is not surprising that a large part of the Act is devoted to stipulating the means and ways of bringing non-citizens under control in matters of employment.

Certain additional measures were taken to secure the purpose of the 1967 Act. For example, it became an offence to employ

a non-citizen without a work permit. The appropriate section provides that:

"any person who employs any person (whether or not for reward) whom he knows or has reasonable cause to believe is committing an offence by engaging in any employment, occupation, trade business or profession whether or not for profit or reward without being so authorised by an entry permit or exempted from this provision by regulations made under this Act shall be guilty of an offence."³⁸

The Courts have given this provision an extremely wide meaning by holding in the case of PRABHULAL v REPUBLIC³⁹ that the fact that a non-citizen is seen attending a customer, whatever that may mean, justifies the inference that he is employed.⁴⁰ The inference is, of course, drawn against the person employing.

Further, the Government established a Kenyanisation of Personnel Bureau at the same time. The Bureau was charged with the task of evaluating whether jobs available or occupied by non-citizens can be taken over by Kenyan citizens. It runs a manpower register which is or can be used to give jobs to Kenyans as the jobs arise. Moreover, it is compulsory for all employers to supply data to the immigration authorities on all non-citizens employed by them. The Bureau works in liaison with the Immigration Department to ensure that skilled Kenyans are hired or employed before a work permit can be issued.

Unlike the U.K. Act, the Kenyan Immigration Act is not concerned with limiting the numbers of immigrants into Kenya. The Kenyan Act is designed primarily to secure jobs for Kenyans irrespective of their colour, race, origin or number. It is also important to note that the 1967 Kenyan Act is not, like its U.K. counterpart, a means of improving or checking local racial relations. There is nothing in it in any way resembling the patriality principle in the 1971 U.K. Act. This is not to say that there are no racial problems.⁴¹ In fact, on the 5th of July, 1967 the Kenyan Government deported 5 Europeans and 7 Asians accusing them of racialism.⁴² Although the deportations were made under the immigration law for "racial" reasons it does not mean that the 1967 Act is intended to regulate racial relations in the same way as the U.K. Act does. Under the Kenyan law, entry, stay and removal of a non-citizen is not based on blood connections like

in the U.K. with the inevitable racial connotations. For that matter, a person, regardless of his race or colour, can be admitted into the country and allowed to remain as long as he is permitted so to do and in appropriate cases, will be deported. It is submitted, however, that if the Government decided to deport people on racial grounds it would be out of the reach of the law to help a person so discriminated under the present 1967 Act.

The Immigration Act 1967 has come under fire of a prominent M.P. that:

"the economy...will not be Africanised whilst the Government continues to give chances to foreigners to continue exploiting the good land of our country,"⁴³

which, presumably, means in the words of another former M.P. that allowing 12 classes of entry permits to foreigners would "nullify the whole Bill".⁴⁴ This attitude is obviously extreme and would be probably counter productive.

(b) Traditional Purposes:

The Kenyan Act of 1967 makes provision for keeping undesirable people out of the country. It is interesting to note that there is nothing express in the Act to prevent people coming into Kenya if, as in the U.K., they are coming to be a social cost to the country. This absence of control of people with no visible means of income is only logical in Kenya where there is hardly anything like the British social welfare system. But the Act does indirectly prevent such people with no visible means of income from coming to Kenya. By creating 13 classes of entry permits this enables people only with substantial incomes or skills to come to Kenya and then only if their presence is or will be of benefit to Kenya it literally obliterates any chance of a man with no substantial income and/or skill from coming to the country.

Conclusions

It was asserted at the beginning of this chapter that the root of the enactment of restrictive immigration laws in the U.K. and Kenya is the same. The critical factor in both countries was the domestic public opinion. Both countries paid heavily in terms of international opinion for adopting exclusionist policies. In the U.K.

successive governments have:

"viewed the domestic costs of an unpopular free entry policy (of coloured immigrants) as outweighing all other factors."⁴⁵

For example, immigration was considered to form the single most important issue in the 1966 General Elections.⁴⁵ In Kenya, as it has been noted, the overwhelming drive behind the enactment of the 1967 Act was the Africanisation policy which was generated by the local public objection to foreigners holding positions in the country that Kenyans should be holding. The Government, which was often cautious about africanising the economy rapidly, was by 1967 forced to recognise that economic equality was absolutely necessary if development was to be achieved and disaster avoided. Thus, local opinions of the immigrants and immigration was and probably has always been the main force or influence behind immigration law in the U.K. and Kenya. Ultimately, whether one is talking of numbers or colour of immigrants or the intent of immigration laws, it appears that:

"the numbers of people coming into any country will be regulated by the number of jobs available in that country"⁴⁷

which the local people cannot do or do not want to do. Should this be the case? Doesn't ^{the} view of the majority in that case overstep and offend one's sense of justice and reason? Indeed, it does and it is questionable that Governments should bow to pressures of this kind. But should people exert these pressures on their chosen Governments? One can only say in the words of one writer that if people in any country sink to this depth and overstep the barriers of justice and reason and flout vested political and legal rights and interests of others:

"it is because, like individuals, they have passions and they are prone to do what is wrong while they discern what is right."⁴⁸

Further, having regard to the system of democratic party politics electioneering and other political and economic realities in both countries, governments of whatever might and influence are prone to public pressure and could indeed, similarly, enact wrong laws while discerning what is right.

Immigration law also forms an important cornerstone of a state's foreign policy and sovereignty. Thus, it is used in the:

"conduct of a state's relations with other countries as the admission or removal of an individual may be influenced by the Government's desire for good relations with the country of which he is a national."⁴⁹

An individual may be refused entry or may be removed from a country because of his subversive political activities. This would represent the state's assertion of its sovereignty. We find, therefore, that in both the U.K. and Kenya a person may be deported or refused leave to enter for reasons of national security. This is an important power, expressive of the sovereignty of the state. Although the number of people likely to be refused leave to enter or deported on grounds of national security is small⁵⁰ it is still a crucial safeguard in that only one person of certain political inclinations, eg. a Communist, can cause a lot of political upheaval in a country if he was allowed to enter and remain there freely. So governments are conscious of their duty to safeguard their sovereignty with the consequence that immigration laws in the two countries are based on sovereignty.

FOOTNOTES
(Chapter 2)

1. A U.K. passport holder was defined as a person issued a U.K. passport by a U.K. Government and not one issued on behalf of the Government of any part of the Commonwealth outside the U.K.; The Commonwealth Immigrants Act 1962, s. 1(3).
2. P. Foot (1965) passim.
3. R. Moore and T. Wallace p. 2.
4. Ibid.
5. Cmnd. 2739 pp. 6 - 7.
6. J.M.Evans p. 30.
7. H.L. Debates, February 29, 1968, vol. 289 cols. 924 -925.
8. Ibid. November 12, 1975 vol. 899 - written answer.
9. R. Jenkins's address to the Institute of Race Relations. Race, January 1967 vol. VIII no. 3 p. 18.
10. Article 19.
11. Article 25.
12. C.P. PATEL 4486/70; I. Macdonald p. 118.
13. C.P. PATEL 4486/70 p. 36.
14. The Times, February 10, 1977.
15. Ireland forms part of the Common Travel Area.
16. D.P.P. v BHAGWAN [1972] A.C. 60 per Lord Diplock.

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17. THAKRAR v HOME SECRETARY [1974] 2 All E.R. 261 p. 266 per Lord Denning M.R.
 18. Mason in "Prosperos Magic" p. 78.
 19. W. Deedles p. 10.
 20. H.C. Debates February 27, 1968, cols. 1345-1348.
 21. S.M. LALJI PATEL & OTHERS v UNITED KINGDOM & C.P. PATEL v UNITED KINGDOM; Macdonald p. 118.
 22. R. Moore and T. Wallace p. 5.
 23. R. Maudling - H.C. Official Report S.C.B. April 1, 1971 col. 233.
 24. E. Powel, H.C. Official Report S.C.B. March 25, 1971 col. 131.
 25. H.C. Official Report, 1971, vol. 813 cols. 43-44.
 26. T.W.E. Roche p. 68.
 27. H.C. Official Report S.C.B. March 18, 1971 col. 23.
 28. I. Macdonald p. 15.
 29. National Assembly Debates, Kenya, July 20, 1967, vol. XII, col. 2493.
 30. D. Rothchild pp. 226-232.
 31. [1971] E.A. 301.
 32. H. Slade, speaker; National Assembly Debates, July 7, 1967, vol. XII cols. 1962-75.
 33. Kenya Development Plan 1970-74 p. 115.
 34. Kenyanisation of Personnel, Republic of Kenya (1967) p. 2.

35. D. Rothchild, *The Journal of Modern African Studies*, 1969, vol. 7 and 4 p. 690.
36. The Army mutiny on January 24, 1964 exposed the ease with which the stability of the country could be undermined. The Prime Minister, Mr. Jomo Kenyatta (as he then was) stressed that the "Government was conscious of the need for a contented police and is working very rapidly in its programme of Africanisation"; C. Gertzel, M. Goldschmidt and D. Rothchild p. 562.
37. D. Rothchild p. 207.
38. Immigration Act 1967, s. 13 (2)(g).
39. [1971] E.A. 52.
40. Ibid. p. 55.
41. Eg. In August, 1968 the Voice of Kenya, a Government department, attacked the Asian community of racialism following a deportation of 6 Kenyan Asians for being disloyal and disaffected towards Kenya; Daily Nation, August 16, 1968.
42. Daily Nation, July 6, 1967.
43. G.G. Kariuki, M.P., National Assembly Debates, July 22, 1967, vol. XII, col. 2926.
44. M. Shikuku, M.P., National Assembly Debates, July 7, 1967, vol. XII, col. 1985.
45. D. Rothchild, p. 406.
46. D. Dearkin p. 19.
47. P. Foot pamphlet p. 11.
48. A. de Tocqueville p. 434.

49. J.M. Evans p. 8.

50. For example in the U.K. there have been only two cases since 1971 when the Immigration Act 1971 was passed.

PART TWO

PART TWOCHAPTER THREEREGULATION AND CONTROL OF IMMIGRANTSUnited Kingdom:(i) Pre-Departure Regulations

A non-patrial wishing to enter the United Kingdom¹ is required to obtain an entry clearance before leaving his country.² An entry clearance is obtainable from a British representative in his country on application.³ There are two types of entry clearances, namely, Entry Certificates and Visas. Entry Certificates are entry clearances given to Commonwealth citizens and citizens of the U.K. and colonies born, adopted and registered or naturalised outside the U.K. and Islands. Visas, on the other hand are entry clearances given to aliens of specified foreign countries.⁴ There is a large number of aliens of foreign countries, particularly from North America and Western Europe who are all exempted from the necessity of having to obtain a visa before departure from their country.⁵ The British representatives abroad are authorised to issue entry clearances to non-patrials only if the non-patrial meets certain requirements of the immigration rules and other instructions by the Secretary of State.⁶ An entry clearance, therefore:

"indicates that the holder's application for entry to the U.K. has passed a preliminary scrutiny by an official British representative overseas".⁷

The broad purpose of an entry clearance, it is said, is eliminating, to a great extent, the hardship which is created by a large number of non-patrials arriving at a U.K. port of entry only to be excluded or deported. It has, therefore, been thought desirable that:

"the eligibility for admission ... should, as far as practicable, be decided before (a person) starts his journey instead of it being left to be decided when he arrives at the port of entry."⁸

A detailed examination of entry certificates and visas is desirable.

Entry Certificates: A person who is charged with the responsibility of issuing entry certificates is an entry certificate officer. An

entry certificate was a facility introduced for voluntary use by Commonwealth citizens which now also applies to non-patrial citizens of the U.K. and colonies not born, adopted, naturalised or registered in the U.K. It is now mandatory for a passenger seeking admission to the U.K. as the wife, child or other dependant of a person settled in the U.K. or a person admitted for employment other than a seasonal worker, or as the husband or fiancé of such a person to hold a current entry certificate issued for that purpose.⁹ Arrival at a U.K. port without an entry certificate will almost certainly mean exclusion from entry. This has also happened in cases related to visas, which will be looked at later. In one case, a Mrs. Loonet Graliara arrived at Heathrow Airport with her husband who was settled in the U.K. He had married her while on holiday in India. Unfortunately, the wife did not have an entry certificate and on arrival the husband, as a settled person, was allowed into the country, but the wife, because she lacked the necessary entry certificate, was refused entry. She was held overnight in the immigrant detention camp at Hamondsworth. She was eventually allowed admission on compassionate grounds, but after paying a price representative only of brutality. As she was about to be put in the homeward bound plane one of the security guards was shown her baby's head emerging from the womb. The baby died.¹⁰

An entry certificate has become by far the most powerful and extremely subtle instrument of a highly selective method of admitting people into the U.K. It may well be argued that it safeguards an individual from reaching Heathrow, or any port of entry, only to be told that he is not eligible for admission and must be excluded. As will be seen shortly, the possession of an entry certificate is not a guarantee that one will be admitted into the U.K. That being so, and when one bears in mind that the general practice of immigration officers at ports of entry is to exclude anyone without an entry certificate, it becomes clear that the purpose for which the U.K. authorities insist on an entry certificate is that it enables them to control immigration into the U.K. at source. There is less publicity given to the refusal of an entry certificate than to that of a person who is turned away at the port of entry. Thus, the authorities suffer less public and international opprobrium by using entry certificates as a means of denying people entry into the

U.K. This may be the reason why it was inserted in the 1971 Immigration Act that a non-patrial who arrives at a port of entry without an entry certificate when he is required to have one cannot, if refused admission into the country, appeal against the refusal of admission while in the U.K. He must first of all leave the country.¹¹ As was noted above, nearly all categories of dependents are required by the Rules to have an entry certificate prior to their departure for the U.K. So, if they arrive without one they must be refused admission forthwith. On the other hand, a person other than a dependent who arrives without an entry certificate is suspected to have intentions of staying permanently in the U.K. A person faced with exclusion in the latter case may either go to the Courts or appeal to the adjudicator against the exclusion. If he goes to the Courts, it has been held in R. v HOME SECRETARY ex parte SAFIRA BEGUM¹² that the function of the Court is merely supervisory and the suit does not form part of the immigration appeal procedure and, accordingly, if the immigration officers act in good faith, then, if they are not satisfied that the basis relied upon had been established, that is the end of the matter. In other words the Court's function is merely to check whether or not the immigration officer made his decision in good faith and beyond that it can't go. This means that the protection afforded by the Courts to a person who arrives at a port of entry without an entry certificate is minimal.

If, however, the person chooses to appeal to the adjudicator, then he must first of all leave the country. In either case, the protection afforded a non-patrial without an entry certificate when excluded is, in reality, illusory. It is obvious, therefore, that the acquisition of an entry permit is necessary in reality and this must be done at the country one intends to leave from for the United Kingdom.

In deciding whether or not to grant an entry certificate, an entry certificate officer must pay attention to all the Rules set out in the Statement of Immigration Rules for control of entry - Commonwealth citizens¹³ - and any other fact that will be relevant in determining the precise intention of every applicant wishing to come to the U.K.¹⁴ and each case will be decided on its own merits. Moreover, having determined the intention of an applicant, an entry certificate officer may also take into account any facts or evidence

which will enable him to determine whether or not it is genuine and for this reason he may consider such things as the local traditions and family ties of the applicant,¹⁵ the cost to the family of a person coming to the U.K.,¹⁶ whether or not the applicant is living in poor conditions in his home country¹⁷ and whether or not an unmarried mother is a widow.¹⁸ What an Entry Certificate Officer cannot do is to give a reason not set out in the Act of 1971 or the Rules made thereunder as his ground for refusing an entry certificate to an applicant. In R. v IMMIGRATION APPEAL TRIBUNAL EX PART SHEZADA GUZ H. KHAN¹⁹ the entry certificate officer refused an entry certificate to an applicant on the ground that his intentions were not "realistic". Para. 19 of H.C. 81 under which the entry certificate officer refused the entry certificate, so far as material, provided:

"An applicant is to be refused an entry certificate as a student if the officer is not satisfied that the applicant is able, and intends, to follow a full-time course of study and to leave the U.K. on completion of it."

The ground that his intentions were not "realistic" was not, therefore, open to the entry certificate officer under the Rules and he could not base his decision for refusal on it. Although he is free to consult anyone and to take into account any evidence that establishes or tends to establish the intentions of the applicant (and whether or not such intentions are genuine or not) an entry certificate officer can refuse any particular class of applicants an entry clearance for reasons set out in the Act of 1971 and the Rules made thereunder. If he acts otherwise, then his decision is reviewable and will be upset by the adjudicator on appeal.

The system of entry certificates:

"has become rigid because of the ... (preoccupation) with the elimination of doubt about discrepancies (of those interviewed by the officers) which may be caused by genuine errors or the difficulty of translating the facts of an actual situation in the village to the different atmosphere of a High Commission Office many miles and a whole culture away."²⁰

There is also a practice of requiring the applicants to prove what they may be asked beyond reasonable doubt and in this connection, A. Lyon remarks that:

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"this (means) that if they (entry certificate officers) had any doubt the application (is) rejected."

He, A. Lyon, comes to the conclusion that the overwhelming ;

"barrier is the concern of officials to keep down the number of entrants."²¹

Ultimately, the function of the system of entry certificates is to keep numbers of entrants down and viewed from this point and only from this point it makes sense to assert that an entry certificate is for the benefit of the applicant. A person is better off excluded at home rather than at the port of entry. The burden that has been placed on the applicant for an entry certificate as a result of the official's rigidity and concern with keeping numbers low is a very heavy one. He has to prove his case beyond reasonable doubt if he is to get an entry certificate.

Visas: Aliens of certain specified countries and stateless people must be in possession of a visa before they leave for the United Kingdom.²² Failure to get a visa in advance will mean automatic exclusion from entry into the U.K.²³ The rule is so fundamental that in every case it has been held by the Courts that an alien who arrives at a U.K. port without a visa when it is obligatory for him to have one has no remedy. He must, therefore, go back. In R. v CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT & ANOTHER²⁴ the Court of Appeal approved the decision of an immigration officer who excluded the wife of a person settled in the U.K. because she did not, inter alia, have a visa from Pakistan. In another case of R. v HOME SECRETARY²⁵ the appellant was similarly refused leave to enter because she was without a visa.

Holders of non-national documents are also required to have valid visas at the time of arrival at a British port of entry.²⁶ However, certain refugees from alien countries whose nationals are required to have visas are exempted from the strict obligation to have a valid visa at the time of arrival. Accordingly, they can come into the U.K. for up to three months without the need of a visa.²⁷ Once they are in the country they are free to apply for the visas from the Home Office.

The mere possession of a valid visa does not guarantee that one will be admitted. This rule is like that of a person in possession

of a valid entry certificate who on arrival is excluded. It may be inferred from this also that the use of visas in this respect is to control the type of people who come into the U.K. at source. With Commonwealth countries it seems that the use of an entry certificate is to control the numbers of people coming to the U.K., but with aliens it seems that a visa is to keep people of objectionable influence, for example communists, from coming to the U.K.

An entry clearance is stamped in the passport and in the majority of cases provides that it is valid for presentation at a U.K. port within six months from the date of issue. In ANDRONICOU v CHIEF IMMIGRATION OFFICER, LONDON (HEATHROW) AIRPORT²⁸ the appellant Mrs. A. was given such an entry clearance. On August 18, 1973 she presented it at a port of entry in the U.K. and she was given leave to enter in the U.K. for one month. On September 9, 1973 she left the country. On December 16 of the same year she sought to re-enter the U.K. of the authority on the same entry certificate accompanied by two children whose names had been added to her passport on November 24, 1973. She was refused leave to enter on the ground that she was not the holder of a current entry clearance. On appeal, it was held that the validity of her entry clearance was terminated on its presentation and use by her on the first visit. The adjudicator found further that her second visit was:

"something new and unconnected with the application whose grounds, after consideration and approval by the entry clearance officer...generated on 9.6.73 the entry clearance which was evidence of her eligibility for entry on 18.8.73."²⁹

The effect of this case is that an entry clearance is expressive both of the number of visits that may be made and of the purpose of the visit. Without both of these an entry clearance is clearly invalid and it cannot be relied upon as a demonstration of a person's eligibility to the United Kingdom. Mrs. A. was not allowed to appeal in the U.K. against exclusion on her second "visit" because not having obtained a second entry clearance and the first entry clearance being invalid for the purpose of her second "visit" she was clearly, in law, without an entry clearance and accordingly she was dealt with like a person without an entry clearance. She could not, therefore appeal against refusal of admission while in the U.K.

The Home Office sometimes issues entry clearances that entitle a person to go out and come into the U.K. for any number of times within a given period of time, normally a year. An entry clearance of this kind may be said to be expressive of time only and not of the purpose of the visit or number of visits made during the given time.

The Secretary of State has power to depart from the Rules and allow a person admission into the U.K. notwithstanding that the person has not met the conditions laid down by the Rules.³⁰ The 1971 Act provides that:

"the adjudicator may review any determination of a question of fact on which the decision or action was based...(but) no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and he has refused to do so."³¹

In T. KHAN v ENTRY CERTIFICATE OFFICER, DACCA³² there arose the problem whether the appellant could appeal when refused an entry certificate after consideration of his application on a discretionary basis, that is, civil disturbances in Bangladesh. The appellant submitted that if the Secretary of State considered some of the cases for entry certificates outside the Rules and allowed some of the applicants to return and refused others, then those refused could appeal. The Tribunal was of the view that whereas it could not say that those refused cannot appeal such appeals to an adjudicator must (my emphasis) fail because of the provisions of the Act s, 19(2) of the 1971 Immigration Act. The Tribunal drew a distinction that is nugatory in that, if in all such cases an appeal must fail, then the right of appeal is illusory. The proper view should be that since the 1971 Act gives the Secretary of State power to exercise the discretion of admitting non-patrials into the U.K. outside the Rules, the right of appeal, if any, lies to the Courts, since the adjudicator has no right to hear such appeals. In all other cases there is no right of appeal under the Immigration Act if a "right" is understood to entail protected interests. It is doubtful if a non-patrial has a right of appeal to the municipal courts, in international law, against the refusal by

the Secretary of State to admit a non-patrial pursuant to his discretion to admit outside the Rules. This is so because there is no known legal relationship between a foreigner wanting to enter into another country and that country he wants to enter. Moreover, the power to admit, tolerate, restrict or prohibit a foreigner in any country seems to be the "prerogative" of the executive and is an expression of the sovereignty of any state in real terms. Governments and Courts guard against inroads into the sovereignty of their countries very jealously.

(ii) Ports of Entry

It has been noted already that having a valid entry clearance is no guarantee for admission into the U.K. Immigration officers are fully entitled to refuse entry to any non-patrial in certain cases. In this section we will examine the powers of immigration officials to refuse such entry for the following reasons, namely:

- (a) where there have been false representations or a concealment of material facts;
- (b) where there has been a change of circumstances since an entry clearance was issued;
- (c) where a person is subject to restricted returnability;
- (d) where there are medical grounds justifying the refusal of entry;
- (e) on grounds of a person's criminal record;
- (f) because a person is subject to a deportation order and
- (g) because exclusion would be conducive to the public good.

(a) False Representations and Concealment of Material Facts

An immigration officer is entitled by the Rules to refuse entry into the U.K. to a non-patrial notwithstanding that he has a valid and current entry clearance if the non-patrial employed false representations or concealed material facts, whether or not to his knowledge.³³

R. Moore and T. Wallace have succinctly summed up the effect of this power. In their words, the effect of the power is to make:"

"the immigration officer... free to define the facts that are to be considered material and is then to treat deliberate fraud in the same way as innocent oversight or ignorance. This single clause puts admission entirely at the discretion of the immigration officer."³⁴

This is true in fact and in law. It is true in fact because there is no limitation on what an immigration officer may consider a material fact. It is also true in law because the Courts have held themselves unable to interfere with the decision of an immigration officer in such cases unless there was an error of law on the face of a decision or unless the officer failed to do his duty.³⁵ Both the negative and the positive aspects of the power of the immigration officers are extensive and perhaps equally disturbing. Lord Widgery has, for example, held that:

"there is no obligation on the officers to make any inquiries on their own initiative...they could merely stand at their bench and wait for the intending entrant to say what he had to say. They must act in good faith, but if they were not satisfied that the basis relied upon had been established, that was the end of the matter."³⁶

This is an aspect of the negative nature of the power of immigration officers under the immigration law which has serious implications. On the positive aspect, the immigration officer may ask any questions he considers material provided he does it in good faith. It now appears that it is probably not possible, or at any rate not easy, for an immigration officer to commit an error of law when acting pursuant to the above power. This follows from the holding of Lord Widgery that the powers and duties of immigration officers which are;

"specifically described...as rules of practice
...(are) not part of the Immigration Act 1971."³⁷

This implies that an error of law can be committed only if the error contradicts a provision of the Immigration Act 1971. It need not be said that the Immigration Act 1971 has not attempted to list the considerations an immigration officer may take into account in such cases and that being so, it becomes hard to see how an immigration officer can commit an error of law. The statements above were made in a case of a non-patrial who arrived without a visa which she was required to have under the Rules. There is no difference with a case where an immigration officer has decided to refuse admission to a non-patrial with a current entry clearance in pursuance of his power under the Rules. The only "benefit" a non-patrial with a current entry clearance has is that when admission to the U.K. depends on proof

of facts entailing enquiries either in the U.K. or overseas the immigration officer could confirm the truthfulness or otherwise of the facts asserted by the non-patrial. But this "benefit" is of limited use only since the inadvertent omission of facts either at the office of the entry certificate officer overseas or at the port of entry is enough to constitute sufficient reasons for exclusion no matter how innocent the omission was. This sometimes makes an arrival without an entry clearance more attractive since an innocent omission of facts is less likely to be used against him than if he had uttered them before. But any real difference hardly exists. Part of the reason for this problem is that the Rules do not form delegated legislation in the technical sense.³⁸ This really is the point from which problems arise. In HOME SECRETARY v PURUSHOTHAMAN³⁹ the Queen's Bench Division held that in an appeal by a non-patrial to an adjudicator against the decision of an immigration officer the adjudicator must take into account any question of fact on which the original decision was based. An appeal to the Tribunal from an adjudicator, where possible, does not depend just on matters of law; it also depends on matters of fact.⁴⁰ That being so it follows that adjudicators and the Tribunal have extensive powers to assess the decision of immigration officers whether on points of fact or on points of law. But according to Lord Widgery the Court has no power to so review the decisions of immigration officers; presumably because a decision of an immigration officer is not justiciable and because the Courts do not form part of the appeals system under the Immigration Act 1971. But it is clear on authority that an adjudicator who refuses to apply his mind afresh to the facts in an appeal by a non-patrial commits an error of law on the face of the record and Courts will invariably review his decision.⁴¹ Presumably this may be the case with the Tribunal. What emerges from all this is that whereas the Courts will not review the decision of an immigration officer if he has acted in good faith, they will review the decision of adjudicators and the Tribunal. In most cases adjudicators do accept the decisions of immigration officers on the basis of the reasons given by them. If a person appeals to an adjudicator against refusal of an immigration officer to admit him and the adjudicator disallows the appeal on exactly the same grounds as those of the immigration officer, then, it appears from the analysis of the above cases that

the Courts may review the decision. But it has no power to review a decision of the immigration officer unless there has first been an appeal to the adjudicator or Tribunal, as the case may be. Now, that is absurd. It would appear that an appeal to an adjudicator or the Tribunal vests an issue with justiciability thus enabling the Courts to review their decisions. There is simply no magic about an appeal to adjudicators or the Tribunal. It is true, however, that Parliament has provided an appeals system that as a general policy anyone looking for a redress must follow it. The Courts are right to insist on that as indeed they have done.⁴² But that is a different matter from saying that they have no power of review of immigration officer's decisions - even in appropriate cases. There is nothing to require them to do this in the Immigration Act. In adopting this attitude, it seems that the Courts are themselves fettering their own discretion and detracting from the principle that they have residual powers in all matters. It is also contradictory and against the principle of judicial precedent to hold that the powers of immigration officers vis-a-vis the Courts are almost absolute and at the same time to hold that the same powers of the same immigration officers must be assessed almost de novo vis-a-vis the adjudicators and the Tribunal.

In all other cases where an immigration officer comes to the conclusion, by whatever means, that a non-patrial has misrepresented or concealed material facts (whatever that may mean) and whether that is done deliberately or not he, the immigration officer, must exclude that person from entry into the U.K. But should he admit that person into the U.K. notwithstanding that it is against any one of the Rules then it is probably the end of the matter.⁴³ Thus, a non-patrial has been refused leave to enter at a port of entry by an immigration officer because his entry clearance as a student had been obtained by misrepresentation to and concealment of facts from the immigration officer.⁴⁴ In another case, permission was refused because on the facts before the immigration officer (including information from relatives named) and taking into account the background of the appellant he was found not to be a genuine visitor and from this it was concluded that he must have obtained his entry clearance by misrepresentation.⁴⁵ In the case of IMMIGRATION OFFICER, RAMSGATE v COORAY⁴⁶ leave to enter was refused by an immigration officer in a

formal notice worded as follows:

"You have asked for leave to enter the United Kingdom as a visitor for 8 weeks, but as you are penniless I am not satisfied that you can support yourself for this period without working. I, therefore, refuse you leave to enter."

The immigration officer refused leave to Mr. Cooray under para. 12 of H.C. 79 the material part of which provides:

"Entry certificates are issued in accordance with the rules contained in this statement: A passenger who holds an entry clearance which was duly issued to him and is still current is not to be refused leave to enter unless the immigration officer is satisfied that:

- (a) false representations were employed or material facts were concealed, whether or not to the holder's knowledge, for the purpose of obtaining the entry clearance.
- (b) a change of circumstances since it was issued has removed the basis of the holder's claim to admission."

On appeal to an adjudicator the adjudicator refused leave to the immigration officer to amend the notice of refusal and ruled that matters in issue in an appeal were confined to the grounds set out in the notice of refusal and that there was no proviso which would permit the amendment of that notice. The immigration officer had refused entry also on the ground that there had been a "change of circumstances" since the clearance was issued in as much as Cooray was penniless on arrival, but the adjudicator ruled that insufficiency of funds was not a ground on which the holder of entry clearance could be refused leave to enter under para. 12 of H.C. 79. He, therefore, reversed the decision of the immigration officer. On appeal by the immigration officer the Tribunal held that there was a concealment of material facts and a change in the circumstances of Mr. Cooray. In allowing the appeal the Tribunal held that the adjudicator should have taken into account all matters pertaining to the decision appealed against and not confine himself to the grounds given in the notice of refusal. It further held that refusal of leave to enter is a civil matter, and in civil matters a Court would allow an amendment if it could be made as in this case, without any injustice to the other side. This latter holding is obiter and it seems to be an oversimplification to call the immigration

appeals civil matters. As to the first holding, the Tribunal was right since it has been held that it is the legal duty of an adjudicator as an appellate body to apply his mind to any appeal problem afresh and to determine what in his judgement was the correct exercise of discretion.⁴⁷

A mere intention to do anything other than what an entry clearance was given for constitutes a ground for an immigration officer to refuse a person entry into the country.⁴⁸ Such an intention amounts to a concealment of or a misrepresentation of material facts. The immigration officer or the adjudicator need not and probably will not go behind the intention. For example, the fact that one has no means of enabling him to put a wish into effect need not be considered. Thus, the face value of an intention is a sufficient ground. It follows from this that immigration authorities, the adjudicators and the Tribunal will refuse entry to a person as long as there has been misrepresentation of material facts. They are not concerned with whether the misrepresentation relates to ineligibility; for example, a showing that the misrepresentation, in order to be held material, concealed facts which might have resulted in a proper refusal of an entry clearance. On the proper construction of the Act and the rules made thereunder there is nothing to stop the immigration officers, the adjudicators and the Tribunal from taking this attitude. It is a harsh rule that says a mere misrepresentation per se and without more constitutes a ground for refusal of entry. The practice of refusing entry on "proof" of a misrepresentation per se is contrary to the principles of good administration. This is undoubtedly the case where the rules require, as they indeed do, that the misrepresentation need not be intentional.

(b) Where There Has Been a Change of Circumstances

A change of circumstances since an entry clearance was issued which removes the basis of a holder's claim to admission is a ground for the immigration officer to refuse one entry into the country.⁴⁹ Any change of circumstance would, it appears, constitute a ground for refusal of entry by an immigration officer. This would not preclude an adjudicator from considering the change of circumstances in an appropriate appeal and in that he may allow the person entry into the U.K. notwithstanding the refusal of entry by an immigration officer

on that basis.⁵⁰ The import of this provision is clearly that an entry certificate officer gives non-patrials an entry clearance only if the latter satisfies certain conditions, particularly the rules, which he has to meet at the time of his application for admission at a port of entry before an immigration officer. An entry clearance being a prima facie satisfaction of the conditions is clearly invalid if the purpose for which it was given has expired or changed. As was noted earlier, the purpose is circumscribed both in time of and reasons for the visit. For this reason it would appear that an immigration officer will be entitled to refuse entry to a child who, at the time of entry is over 18 years old and who is not a dependent although the child was under 18 years at the time he obtained his entry clearance.

In one case, the Tribunal has ruled that in an appeal against refusal of an entry clearance by an entry certificate officer an adjudicator may, in certain cases, consider a subsequent change of circumstances of a non-patrial which would otherwise have formed a basis for a new application of an entry clearance.⁵¹ It is similarly submitted that adjudicators and the Tribunal have power to look at each case and determine whether a subsequent change of circumstances removes the former claim for admission is one in which to exercise discretion in favour of a non-patrial notwithstanding that evidence of such subsequent change of circumstances was not before the immigration officer because it was non-existent then. In a recent case, the Tribunal ruled that it would not lay down a:

"hard and fast direction...since facts in appeals were infinitely variable."⁵²

In that case of HOME SECRETARY v THAKERAR⁵³ the Secretary of State appealed against the decision of the adjudicator who allowed the appeal of the respondent on grounds that were not before the Secretary of State at the time of application for renewal of leave to stay by the respondent. Although the Tribunal allowed the appeal of the Secretary of State on other grounds, it held that since:

"immigration appeals arise from facts which are infinitely variable..."

it would not be possible to lay down a hard and fast rule. For that reason it was clear to the Tribunal that:

"a pragmatic approach to the problem involving questions of expediency is necessary if as much justice as possible is to be done between the parties (and) the application of legal precedents in vacuo could obviously lead to unjust results."⁵⁴

The Tribunal gave a liberal interpretation to the rule but in the case of ENTRY CERTIFICATE OFFICER, LAHORE v ABDULLAH⁵⁵ it has been ruled that such a liberal interpretation must not be applied in every case. In other words, a departure from the rules must not be lightly made.⁵⁶ In the case of Abdullah above it was held that evidence of subsequent facts which if before the immigration officer might have influenced his decision by indicating some change in the applicant's original circumstances should normally form the basis of a further application. Although this rule of practice must not be departed from lightly it must not, on the other hand, be applied inflexibly. Thus, the Tribunal has held that an adjudicator should have admitted "new" evidence in a case in which evidence relevant to an application for entry as a visitor arose during the period of two years between the date of the application and the appeal hearing before the adjudicator.⁵⁷ To have required him to make a fresh application would have been unduly onerous having regard to the particular circumstances of the case.

Where, however, new evidence is before an immigration officer and that evidence has arisen since the issue of an entry clearance then the immigration officer is duly entitled to refuse entry on the ground that the subsequent circumstances since it was issued have removed the basis of the holder's claim for admission.⁵⁸ In this case it is a matter of straightforward appeal to an adjudicator who shall look at the whole issue afresh.

(c) Refusal for Restricted Returnability

Immigration officers may also refuse entry into the United Kingdom to holders of a current entry clearance on grounds of restricted returnability unless such holder is being admitted into the U.K. for settlement.⁵⁹ If his permission to enter into another country has to be exercised before a given date, the length of his stay in the U.K. should be restricted so as to terminate at least two months before that date.⁶⁰ It is not clear what will happen if the person so admitted overstays in the country beyond the time allowed to him to exercise his right to return. Overstaying constitutes a criminal

offence⁶¹, but on the other hand, the person overstaying is regarded as ordinarily resident and may, in certain circumstances, confer settlement rights on the person.⁶³ If the passport or travel document of the person is endorsed with a restriction on the period for which he may remain outside his country of normal residence, his stay in the U.K. should be limited so as not to extend beyond the period of authorised absence. The holder of a travel document issued by the Home Office should not be given leave to enter for a period exceeding beyond the validity of the document.⁶⁴

(d) Refusal on Medical Grounds

This ground has been invoked in several cases. Except for EEC nationals there are no diseases or medical grounds listed as constituting health hazards to the community. It is, therefore, left to the medical inspector to determine whether in his view a person is medically undesirable to come into the U.K. As a rule, a passenger who intends to remain in the U.K. for more than six months should normally be referred to the medical inspector for examination, as should any passenger who mentions health or medical treatment as his reason for his visit, and any person who appears mentally or physically abnormal.⁶⁶ An immigration officer has a general discretion to refer any one person for medical examination.⁶⁷ The rules are the only indication we have of the fact that a person may be ineligible for entry on medical grounds and on physical or mental grounds.⁶⁸ Presumably these include people suffering from feeble-mindedness, narcotic drug addicts, insanity, psychopathic personalities and dangerous diseases. If, on examination of a passenger, the medical inspector is satisfied that the person is unfit for medical reasons to be admitted into the U.K. then he must give a certification of that fact.⁶⁹ In AL-TUWAIDJI v CHIEF IMMIGRATION OFFICER, LONDON (HEATHROW) AIRPORT⁷⁰ the Tribunal held that in the absence of "strong, compassionate reasons" the certificate of the medical inspector refusing admission is binding on an immigration officer who cannot depart from it. The medical certificate must, to be binding on an immigration officer, state specifically that:

"I have medically examined the above-named entrant and I consider he is suffering from... I hereby certify that it is undesirable for medical reasons to admit the entrant."⁷¹

Thus, where a medical inspector, after an examination, gave a certificate saying that:

"in view of heart disease, candidate is medically unfit.
Entry not recommended ..."

it was held by the Tribunal that an immigration officer was not bound by the medical inspector's recommendation.⁷² It was recognised by the Tribunal that the medical inspector's powers to deprive a person of his power of qualification to enter the U.K. is wide and because of this his power must be confined to the strict letter of the immigration rule.⁷³

It is submitted that in view of the wording of the rules that:

"where the medical inspector advises for medical reasons it is undesirable to admit the passenger ..."

a passenger may not be refused entry if at the date of entry the passenger's defect or disease, mental or physical, has been permanently cured or arrested. But even here there are doubts as well. For Example, a person who suffered from tuberculosis which is now cured may be suffering from pulmonary fibrosis, a physical defect occurring from the attack of tuberculosis which might interfere with the ability to earn a living. Such a person could, conceivably, be excluded from entry on medical grounds. The categories of defects and diseases are largely unlimited and for this reason it appears that the power of a medical inspector to exclude a person on medical grounds would almost make an immigration officer's mouth water.

A person who refuses to submit to medical examination will be refused leave to enter.⁷⁴ There will be occasions when this provision will contravene a person's rights. For example, a person may object, conscientiously, to medical examination on religious grounds. Although this may not be kindly or even sympathetically listened to one must accept or recognise that religious freedom might entail a refusal to be medically examined. As far as an immigration officer is concerned, that fact of objection to medical examination gives him the right to refuse entry and he is not expected and cannot probably be expected to be concerned with questions of human rights.

Returning residents or wives and children under 18 of people settled in the U.K. should not be refused leave to enter on

medical grounds.⁷⁵ This exception is important for its recognition of family ties and state responsibility towards people it has a responsibility for.

The most important provision in the area of refusal of entry on medical grounds is that an immigration officer has a discretion to admit a person into the country contrary to the order of a medical inspector if there are strong compassionate reasons.⁷⁶ A passenger can, therefore, appeal on the ground that there are strong compassionate circumstances, but he cannot appeal on the ground that the medical inspector's advice was not warranted on the medical evidence where the medical inspector's advice is imperative and not a mere recommendation.⁷⁷ What then constitutes a compassionate reason?

What will constitute a compassionate reason will vary from case to case, depending on the particular circumstances of each such case. Thus, in LIBERTO v IMMIGRATION OFFICER, LONDON (HEATHROW) AIR-PORT⁷⁸ it was held by the Tribunal that it did not constitute compassionate reasons to seek entry merely because one has commenced civil proceedings in the U.K. and the cost of taking evidence on commission abroad would be costly matter - the person was not poor - and that a witness should appear before a judge and enable an impression to be formed as to whether he was a reliable or an unreliable witness. Civil proceedings do not, therefore, amount to "strong, compassionate reasons".

In ENTRY CLEARANCE OFFICER, BOMBAY v SAZHA⁷⁹ the respondent who was 30 years old was severely retarded mentally. It was agreed that she was in need of care and attention, but an entry certificate was refused on the recommendation of an official medical referee and on the view of the entry certificate officer that strong compassionate reasons did not exist. She appealed against the decision on the ground that her half-brother in the U.K. who had agreed to take care of her was the ^{only} living relative who could care for her and that there were strong compassionate reasons for her admission. In India where she came from she had lived with her cousin who was a paid, but an unwilling custodian. There were no problems of accommodation in the U.K. and she was not coming to take employment. In the circumstances the half-brother was the only person who could care for her. On the basis of that evidence, it was held by the adjudicator and the Tribunal

that there existed sufficient strong compassionate reasons and she had to be granted an entry certificate.

The conclusion that can be drawn from these two cases is that to constitute strong compassionate reasons one must have compelling grounds. The Tribunal itself, in an attempt to define strong compassionate reasons described it as reasons which are "totally exceptional and of a compelling nature".⁸⁰ The standard is, therefore, very high and it follows that it is only in a few cases - so far only one - that an immigration officer will admit a passenger into the country contrary to an imperative certificate of a medical inspector on grounds of compassionate reasons.

(e) Refusal on Grounds of a Criminal Record

A passenger with a criminal record may be refused admission by an immigration officer notwithstanding that he (the passenger) has a valid and current entry certificate.⁸¹ The rules provide specifically that a passenger, other than the wife or child under 18 of a person settled in the U.K. who has been convicted in any country, including the U.K., of an offence included in the list of extradition crimes contained in the 1st Schedule to the Extradition Act 1870 (as amended by subsequent enactments) should be refused leave to enter unless the immigration officer considers admission justified for strong, compassionate reasons.⁸² The word 'should' has been interpreted as being mandatory⁸³ and, accordingly, in the absence of reasons that are ... "totally exceptional and of a compelling nature"⁸⁴ the immigration officer has no discretion but to refuse admission.

The problem, however, places an intolerable task on an immigration officer because there are a lot of legal technicalities and problems involved in it. Normally there is no problem where a person has been convicted of a crime forming one of the many crimes listed in the Extradition Act 1870-1935 of the U.K.⁸⁵ In that case, all the immigration officer does (assuming, of course, he knows of the criminal record of the passenger) is refuse admission in the absence of strong compassionate reasons. Equally, there is no problem where a passenger has been convicted of a crime abroad which does not form part of the crimes listed by the Extradition Acts. In that case, the immigration officer cannot consider it under this provision and he cannot, therefore, refuse admission by virtue of or under the provision. In all cases where the person has been previously

convicted in the U.K. for committing a crime forming part of the list of those listed, the immigration officer must also refuse admission in the absence of strong, compassionate reasons. But in all these cases an immigration officer should, if he is to do his duties adequately, look at the offences for which a person is or has been convicted of and satisfy himself that the offences have all the essential elements (in law) of a crime listed in the Extradition Acts. This is a formidable task for which an immigration officer will normally lack the skill. The problem of "essential elements" arises from the fact that under the Extradition Acts, a crime is extraditable if it would constitute one or more of the offences listed if it were committed in England or within the English jurisdiction.⁸⁶

It is not clear what the word "conviction", as used in the rule above, means. Presumably the meaning ascribed to it under the Extradition Acts applies to it. In that case:

"conviction or convicted do not include or refer to a conviction which under foreign law is a conviction for contumacy..."⁸⁷

but unlike the Extradition Acts, it does not include an accused person. However, conviction extends to a conviction contrary to natural justice⁸⁸ and, accordingly, a passenger convicted of any of the offences listed, but in absentia will fall within the purview of the power of an immigration officer for exclusion from admission. But the immigration officer must satisfy himself that the essential elements of the offence for which he was so convicted are the same as those of English law. It appears also that the immigration officer is to restrict himself to the elements of an offence under English law and cannot, for example, consider the essential elements of the offence under Scottish law, if any.

Reference to the list of offences under the Extradition Act 1870 (and amending Acts) would seem to impose on an immigration officer a duty to consider whether or not the conviction of an alleged offence was of a political character or not. An immigration officer is obviously ill-equipped to deal with this kind of problem. The rules do, in this respect, also impose a formidable task on him.

The rule above is also totally silent as to whether or not a passenger, who has been convicted of an offence, under the Extradition Acts, but has been pardoned by a competent authority, will be

excluded from admission. A pardon granted before or during prosecution, but before conviction, would probably remove a passenger from the scope of the rule. But if he is pardoned after conviction he will probably be ineligible for admission under the rule. Passengers who are convicted of crimes in the Extradition Acts, but whose sentences have been suspended will, probably, not be eligible for admission under the rule.

The rule is also totally silent on whether or not juvenile offenders who are convicted of any of the listed crimes are ineligible for admission under the rule. If a "literal" meaning is attached to the definition of the word "conviction" above, it would appear that convicted juvenile offenders must be excluded under the rule in the absence of strong, compassionate reasons.

In LANGRIDGE v HOME SECRETARY⁸⁹ the appellant, a school teacher, was convicted in Hong Kong of a drug offence which was an extraditable offence under the Extradition Acts. When she was released from prison, she came to the U.K. with a valid Department of Employment voucher, but on arrival she was refused leave to enter on the ground of her criminal record. On appeal, she pleaded for admission on compassionate grounds, that is, that before she applied for an employment voucher she had been assured by the British High Commission Office that such an offence would not prohibit the issue of a voucher; that she wished to marry a U.K. citizen in England (there was no contract of marriage, but it might have been imminent); and that she had close connections with the U.K. It was held that those reasons did not constitute sufficient compassionate grounds under the rule. The Tribunal took other things into account, for example, the likely effect on pupils and their parents.

It is interesting to note that in the above case the Tribunal considered the likelihood of the appellant not ever committing the offence in the future, although it declined to make a ruling on it. The rule of excluding passengers with criminal records is based on the fact that an offence was committed for which a ^{person} was convicted. As long as those two elements are present, one is not required to look at the future conduct of the passenger. The rule presumes all non-patrials who have committed the specified offences and have been convicted irrebutably "guilty" and to consider their likely future conduct would not only be speculative, but a negation of the rule.

(f) Refusal on Deportation Grounds

A passenger who is currently subject to a deportation order is to be refused leave to enter although he has a valid and current entry clearance.⁹⁰ If he wishes to make representations, he should be advised that on return to his own country it will be open to him to apply for revocation of the order and, where appropriate, that he will have a right of appeal if revocation is refused.⁹¹ An appeal against a refusal to enter shall be dismissed by the adjudicator if he is satisfied that the appellant was at the time of the refusal subject to a deportation order.⁹² The effect of this is that a person subject to a deportation order must be refused admission into the country and he has no right of appeal. Moreover, such a person has no right of appeal against refusal of an entry clearance⁹³ and it follows, therefore, that he will generally have no chance of entry under the law. He may, however, apply for a revocation of a deportation order to which he is subject by the Home Secretary. If revocation is refused he has a right of appeal.⁹⁴ In most cases the Home Secretary will refuse the revocation of such a deportation order if the person has a criminal record or he has disobeyed immigration regulations to which he may be or may have been subject. Thus, the Home Secretary has refused revocation of a deportation order where a person gained entry into the country by false pretences and overstayed for a considerable time knowingly in contravention of the law.⁹⁵ The fact that he was separated from his wife and two children for one year before he sought a revocation did not constitute compassionate reasons. In another case, the Home Secretary refused to revoke an order made a few weeks after a deportation was made following a failure to comply with conditions of stay.⁹⁶ The appellant also left his wife and three children in the U.K. By the time the appeal got to the Tribunal he had been out of the country for three years. The Tribunal upheld the decision of the Secretary of State, but stated that in view of the appellant's anxiety as to the circumstances and whereabouts of his family in the U.K. the Secretary of State might consider it proper to review the order; he is not bound to revoke the order.

(g) Refusal on Grounds Conducive to the Public Good

Finally, a passenger may also be refused entry by an immigration officer

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on grounds conducive to the public good.⁹⁷ Any passenger except the wife or child under 18 of a person settled in the U.K. may be refused leave to enter on the ground that his exclusion is conducive to the public good where:

(i) the Secretary of State has personally directed so, or

(ii) from the information available to the immigration officer it seems right to refuse leave to enter on that ground if, for example, in the light of the passenger's character, conduct or associations it is undesirable to give him leave to enter.⁹⁸

Where the Secretary of State personally certifies that he has given directions for the passenger not to be given entry into the U.K. on the ground that his exclusion is conducive to the public good then that person must be excluded from entry and he has no right of appeal.⁹⁹ The possession of a valid and current entry clearance will be of no assistance in this case as will be a plea of admission for compassionate reasons.

The power exercisable by immigration officers under the above rule to refuse leave to enter on grounds conducive to the public good must not be lightly used or in trivial circumstances, the Tribunal has so held.¹⁰⁰ This probably means that the discretion of the immigration officer must be used cautiously and with circumspection. However, the possession of cannabis, though small in amount by a passenger constitutes a ground that justifies a refusal of entry by an immigration officer.¹⁰¹ It is also recognised that the rule is designed to deal with "undesirables" wanting to enter the country and, because of that it is impossible to enumerate or to define the types of circumstances in which the power may be used.¹⁰²

There is no guide on whether an "undesirable" passenger refused entry by an immigration officer may be admitted if appropriate compassionate or compelling reasons for admission exist. It is submitted that in such cases there should be admission, otherwise the rule would be an inflexible principle in vacuo and likely to inflict considerable injustice in deserving cases.

The really difficult issues arise from words like conduct and associations of a person. In the absence of a definition of the words a passenger may find himself refused entry for his past conduct or association, whatever that may mean. Does association with a

prescribed organisation for the purposes of obtaining employment, food rations or other essentials of living amount to a ground for refusal of entry, though? How about membership of a trade union for the purpose of retaining one's profession? It is submitted that the rule is not intended to be used for wholesale exclusion of passengers who have accidentally, artificially or unconsciously or in appearance only been associated with what the Secretary of State or Immigration Officers may, in their discretion, consider bad associations. As far as possible, the rule should be restricted to people seeking entry for the purpose of engaging in activities that would be prejudicial to the public interest or endanger the welfare, safety or security of the country. But even in this there should be exceptions. There is a famous U.S.A. case in which an individual, who actively professed pacifism and advocated all opposition to conscription, was admitted into the country for the purpose of taking part in discussion groups on the subject.¹⁰³ The unpopularity of the subject in the U.S.A. was not a ground in itself rendering the passenger ineligible. It would follow that the ground for exclusion from entry must be engaging in prohibited activities on arrival in the country. Thus, merely because people do not like, say, a film on the sex life of Jesus should not of itself be a ground for refusing entry of a person if he is merely coming to discuss the subject. In all the above cases an immigration officer can, for the purpose of determining whether to admit a non-patrial into the country or refusing the admission, search a passenger and his baggage for any document he wishes to see and can seize anything he finds. In one case, a Danish woman was refused leave to enter into the U.K. with three men in whose vehicle, after a search, was found a large quantity of cannabis resin.¹⁰⁴ The adjudicator took the view that the rule permitting exclusion on grounds of public good was wide enough to cover those passengers against whom strong and reasonable suspicion exists of criminal activities or associations or moral turpitude or both. The appellant seemed to fit in this description because she had left her child and husband in Denmark and pursued an "informal life style" in Morocco and after her money ran out, survived by begging and scrounging. The Tribunal upheld the adjudicator's decision and rejected the argument that it was necessary for the immigration officer to spell out what part of the public good was being safeguarded by her exclusion.

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Finally, it was decided in a recent case of R. v HOME SECRETARY EX PARTE BADAIKE (The Times, May 4, 1977 at p. 10) that there being no provision for what form "a notice in writing" giving leave to enter as required by s. 4(1) of the 1971 Immigration Act had to take the absence of anything fuller than the stamp in the passport of a passenger did not invalidate the permission to enter. In other words, a stamp in the passport of a passenger endorsed by an immigration officer constituted a notice in writing giving leave to enter the country as required by s. 4(1) of the Act.

We will now examine the categories of people who may enter the U.K. for various purposes. Unfortunately, due to a limitation on the number of words EEC nationals will not be examined in any section.

(iii) Coming for Temporary Purposes

There are three categories of passengers who may be classified as coming into the U.K. for temporary purposes and they are visitors (including those coming for medical treatment), students and "au pair" girls.¹⁰⁵

(a) Visitors

A passenger¹⁰⁶ seeking entry into the U.K. as a visitor is to be admitted if he satisfies the immigration officer that he is genuinely (emphasis supplied) seeking entry for the period of the visit as stated by him and can, without working, support himself and any dependents for the period and meet the cost of his return or onward journey. Visitors coming to stay with relatives or friends are to be admitted if the immigration officer is satisfied that no more than a visit is intended and that the support available is adequate. In all other cases, leave to enter should be refused if the immigration officer is not so satisfied and, in particular, leave to enter should be refused where there is reason to believe that the passenger's real purpose is to take employment or that he may become a charge on public funds if admitted.¹⁰⁷

As has been noted elsewhere, "should" is a mandatory term. It follows, therefore, that a visitor whose real intention is to take employment or become a charge on public funds or even settle in the U.K. must be refused leave to enter. For this purpose if the immigration officer is not satisfied for whatever reasons, that a

visitor's intentions are ~~not~~ genuine, e.g. that he will take employment once admitted he must refuse leave to enter to the passenger. A visitor may be a tourist, a person visiting relatives, a person coming for medical treatment, a businessman or a passenger in transit. Before examining the methods of determining the intention of a visitor, some general matters must be mentioned here. A visitor who satisfies an immigration officer that he is genuinely seeking entry for the purpose of a visit, can support himself during his stay, does not intend to take up employment and that he can meet the cost of his return or onward journey (which, mainly, means that the visitor must have a return or onward transit ticket) should normally be admitted for six months.¹⁰⁸ The period should not be restricted to less than six months unless it is justified by special reasons, for example, in cases of restricted returnability, or if the passenger is due to leave the U.K. on a particular charter service, or in transit to another country, or his case ought to be subject to early review by the Home Office.¹⁰⁹ In one case, a passenger was given only three months leave of stay on the ground that his original intention was to visit his "relatives" for three months although he had later intentions of staying longer than that.¹¹⁰ A visitor who intends to stay shorter than six months will, therefore, be permitted to stay for that period he asks.

A visitor who has been granted leave to enter and remain in the country for, say, six months may wish to stay for a longer time than the time he is given leave to stay. In that case, the immigration officer should readily allow that person leave to remain in the country for a longer time if the former is satisfied that the person is able to maintain himself and his dependants, if any, for that longer time he asks.¹¹¹ However, it is rare for an immigration officer to grant, in that case, more than 12 months stay in the country.¹¹² Anyone wishing to stay longer than 12 months should, near the end of that period, apply to the Home Office for an extension of his stay.

Usually, a condition prohibiting taking employment is imposed on visitors.¹¹³ No such restriction may be placed on the nationals of EEC member states unless, in view of personal conduct, it is necessary to do so.¹¹⁴ For the purpose of determining who an EEC national is, the rules provide that an

"EEC national means a national of one of the other member countries of the community.... except that a passenger, who is:

- (a) a national of the Netherlands solely by birth in or other connection with Surinam or the Antilles or
- (b) a national of France solely by birth or other connection with one of the French Overseas dependent territories,

is not on that account to be regarded as an EEC national." ¹¹⁵

Dutch and French black African citizens are, by this rule, not EEC nationals and should, accordingly, have a prohibition barring them from taking employment if and when admitted into the U.K. ¹¹⁶

Even if no prohibition is imposed, non-EEC nationals cannot take employment for which a work permit is required, but there appears to be nothing to stop a Commonwealth citizen from taking such an employment in the circumstances. ¹¹⁷

The rules are equally restrictive on people coming to stay with relatives. ¹¹⁸ An immigration officer must be satisfied that no more than a visit is intended and that the support available is adequate. In the final analysis, whether a visitor is coming to stay with his relatives or is going to be self-supporting, the immigration officer must, in addition to the above conditions, be satisfied that the visitor intends to leave the U.K. at the end of his stay. If a visitor, during his stay in the U.K., wishes to remain there in some other temporary capacity ¹¹⁹, eg. as a student or "au pair" girl, he or she must request permission from the immigration authorities. Provided the requirements for the new capacity are satisfied, the change of capacity will be granted as requested. ¹²⁰ A person who wants to change his capacity, thus, runs the risk of getting a refusal on the ground that he had the desire or intention of changing his capacity before he came to the U.K. and, accordingly, his original entry was based on deception of the immigration officers. The Tribunal has ruled that:

"the immigration rules were not designed to allow persons, whose real purpose in coming to this country (U.K.) was to study, to enter under the false pretence that they came for no purpose other than a short visit. Such persons could not reasonably expect that, having presented the Home Office with the fait accompli of compliance with the formal requirements for students, they had a right to stay on in that capacity." ¹²¹

The unfortunate girl in this case had complied with all the other formal student requirements. Her only fault was that she came under the guise of a visitor and then only because her formal letter of admission to a Business Studies College of Technology had failed to get to her in her own country in time. This is an example of the strictness with which the authorities and appeals system interpret the rules.

Visitors may also be admitted into the U.K. for the purpose of private medical treatment at their own expense. The immigration officer should take into account the Medical Inspector's assessment of the likely cost of treatment, including accommodation, in deciding whether a passenger's means would be adequate. The passenger should be asked to produce evidence that arrangements have been made for consultation or treatment.¹²² The Tribunal has held in the case of MOHAN SINGH v ENTRY CERTIFICATE OFFICER, NEW DELHI¹²³ that the above rule governing medical treatment must be read in conjunction with the other paragraphs affecting the admission of visitors and accordingly an applicant must, inter alia, satisfy an immigration officer that he is genuinely seeking entry for the period of his visit as stated by him. Having satisfied the formal requirements, however, he cannot be required to undergo any necessary treatment in his own country if such treatment is available there before he comes to the U.K. for the private treatment.¹²⁴

Where a visitor applies for an extension of stay to undergo or continue private medical treatment, information should be obtained about the progress made with the treatment, its likely duration and the visitor's ability to meet the cost and depending on the outcome of the enquiries an extension on stay may be granted.

Intention: Having stated the preliminary matters, attention must now be turned to considering the methods of determination of the intention of a visitor by an immigration officer. The only guide available is the cases already decided. The analysis of how immigration officers reach their decisions of the intention of an applicant will, therefore, largely, be a study of case law.

In one of the earlier cases it was held by the Tribunal that where an immigration officer felt or suspected, for given reasons, that a passenger would seek employment whilst she was in the U.K. then the immigration officer would be acting properly if he

refused the admission of the passenger on the ground that she was not a genuine visitor.¹²⁵ In that case, the assistant passport officer had refused entry to the passenger for the reason stated. The startling thing was that he arrived at that decision on the ground that the passenger had not been employed since she left school at 16 (about ten years previously) and that her parents had no savings or a car. The officer did not, as the Tribunal appreciated, have any documentary evidence for his suspicions as there had been in other cases. Yet, it refused to say that the officer's suspicion was without foundation or was not justified and this, notwithstanding that the passenger had an assured and adequate accommodation and funds for her return journey. The Tribunal was merely content to quote Lord Parker that:

"insofar as the ... officers were not satisfied or if they felt, and I am dealing with onus of proof, that she was likely to obtain a job during the period that they allowed her to come in, notwithstanding that (her expenses were to be met fully by friends and relatives)... they would be entitled to refuse her entry."¹²⁶

The clearest import of this case is that if an immigration officer suspects that a passenger is going to take employment during his stay in the U.K. he will be fully justified to refuse that person entry unless his suspicion is and can be shown to be manifestly unfounded. That the passenger satisfies all the other conditions of entry into the U.K. will be of little, if any, assistance. That being so, a passenger's intentions will, accordingly, be considered not genuine.

The above case summarises the methods used by immigration officers to determine the intention of visitors. If for any reason which can be brought properly within the purview of the rules any doubt is raised in their minds as to the purpose of one's visit, then more often than not, they simply refuse entry on the grounds that passengers' intentions are not genuine. Thus, where a person asked for entry when he was penniless, the immigration officer was justified to refuse him entry on the ground that his intentions were not genuine.¹²⁷ In this case, although in fact lack of money was not one of the grounds for refusing entry into the country, the Tribunal

was satisfied that the immigration officer had exercised his discretion properly because he had regard to all the other circumstances, eg. concealment of material facts when applying for entry clearance.

In all cases where there has been a misrepresentation or concealment of material facts, an immigration officer will automatically refuse entry, normally on the ground that the intentions of the passenger are not genuine.¹²⁸

In MANMOHANSINGH v ENTRY CLEARANCE OFFICER, NEW DELHI¹²⁹ it was held by the Tribunal that when considering whether an immigration officer can be satisfied that an applicant for a visitor's entry clearance was a genuine visitor, he had to take into consideration the circumstances of the person seeking entry, for example, when it was proposed as it was in this case, that a considerable sum of money should be expended by a family with limited resources. In this case, and on the basis of the above reasoning, ^{the Tribunal upheld} the decision of the immigration officer to refuse entry to the applicant on the ground that he was not a genuine visitor.

A person wishing to come to the U.K. as a visitor should be allowed admission notwithstanding that he has previously contemplated seeking entry for settlement or as a student.¹³⁰ The person's "intention" is the essential issue to be decided by the immigration officer. The only requirement made of him is that he must make full disclosure of his previous contemplations to seek entry. Were it otherwise, once an applicant had disclosed a previous wish to settle in the U.K., he would find it almost impossible to establish himself as a bona fide visitor, the Tribunal has so ruled. The only problem with this is that judging from the practice of the immigration authorities, a person who declares his previous intentions to come to the U.K. leaves the Home Office free to argue that his future intentions are in doubt and on that basis refuse entry.¹³¹ In ENTRY CLEARANCE OFFICER, COLOMBO v HANKS AND OTHERS¹³² one of the applicants was refused an entry clearance following her full disclosure that she had previously wanted to come to the U.K. and settle and also that she had tried to emigrate to Australia. Her application for an entry clearance at this particular time was simply to come and visit her married sister settled in the U.K. The applicant had a well paying job in Sri Lanka, too. To argue, therefore, as the Tribunal did that full disclosure of previous attempts to come to the

U.K. together with a clear intention merely to visit should be enough to enable a person to be admitted into the U.K. is to overlook the way the minds of immigration authorities, and all of us, work. It is an oversimplification. Full disclosure of previous attempts to come to the U.K. neither confers extra benefits nor lessens the disadvantages of non-disclosures.

If a person's circumstances at home, whether financial or otherwise, are such that they do not, in the opinion of the immigration authorities, represent an incentive for him (the person) to return home, then his intention for coming to the U.K. will be suspect and he will be refused entry on the ground that his intentions are not genuine.¹³³ The fact that one has been unemployed for four years or that one has wanted to emigrate to a different country in the past, but has a job now in his country, have been considered as constituting disincentives for the applicant to return to their country.¹³⁴ One need hardly add that the range and list of things that could be considered as constituting disincentives under this rule is inexhaustible. This is, therefore, a dangerous, and it may be a venturesome, exercise of discretion. It is submitted it should be used most rarely. Otherwise it may be doing indirectly what neither the Immigration Act 1971 nor the rules directly authorise. Intention will become a vague term if it is so widely, sometimes loosely, used. It encompasses cases of people coming to the U.K. for primarily certain unprohibited and legal reasons, but with a secondary desire to do what is prohibited by the rules. Thus, in one case, a person was refused entry on the ground that his intentions were not genuine because he came with the definite purpose of looking for employment, although such a purpose was secondary to his main purpose of visiting his close friend.¹³⁵

Family Reasons: Finally, mention must be made of people coming to the U.K. as visitors for family reasons. In AFOAKWAH v HOME SECRETARY¹³⁶ the appellant was admitted into the U.K. for the purpose of giving temporary help in the home, in Scotland, of her brother and the latter's wife, both of whom were engaged on post-graduate studies which involved night work. They desired the appellant to stay for a period to look after their children and they proposed to support her during that period. She was allowed entry for that reason and also for the reasons that the Tribunal was satisfied that she was a bona fide visitor;

she would not be gainfully employed after her admission and on the facts the appellant's brother was financially able to support her during the period of her stay and also because the appellant's own financial circumstances at home did not suggest that she was seeking entry in order to "latch on to some of the benefits of the welfare state". In another case a woman was allowed entry for a limited period for the purpose of looking after the sponsor's of three children while she attended a teacher training college.¹³⁷ But she had to satisfy, as above, that she was a genuine visitor and had no intention of working etc... The latter case was decided when the new rules under the 1971 Immigration Act had come into force, although the decision related to the former rule which provided:

"The need to impose a control on immigration for settlement in no way diminishes the Government's desire to welcome Commonwealth citizens coming to the U.K. on holiday or for family, social, cultural or business reasons."¹³⁸

This rule is now superseded and the present rules do not make any provision for people coming to the U.K. for family reasons. Does this mean that people may not under the present rules, come to the U.K. for family reasons? This question arose in the case of ENTRY CERTIFICATE OFFICER, LAGOS v SHAMONDA¹³⁹ and the Tribunal upheld the submission that:

"the omission of any such specific provision in the new rules does not mean that a visit for family reasons is necessarily outside the meaning and spirit governing visitors in (the new rules)"¹⁴⁰

Thus, it is still possible for people from the Commonwealth to come as visitors for family reasons. The above case has however narrowed down the interpretation to be given to the expression "family reasons". Following another case¹⁴¹ the Tribunal accepted that there is a distinction between an application to assist the mother of the children to enable her to be gainfully employed and where the real but concealed reason for a member of a family coming to the U.K. is to relieve another member of the household duties, and in fact, be employed as a domestic, so as to enable that member of the family to engage in or continue in remunerative employment in the future. In the latter case, the person might more properly apply for a work permit rather than a visitor's entry permit.

It is not clear from the judgement of the above case how the Tribunal came to the decision that it is possible for people to come into the U.K. as visitors for family reasons when there is nothing in the rules to authorise it. It appears that this reasoning was based on the fact that coming for such a purpose can be read into para. 15 of H.C. 79 which, as far as material, states that:

"a passenger seeking entry as a visitor is to be admitted if he satisfies the immigration officer that he is genuinely seeking entry for the period of the visit stated by him and can without working, support himself...and meet the cost of the onward journey. Visitors coming to stay with relatives or friends are also to be admitted if the immigration officer is satisfied that no more than a visit is intended and that the support available is adequate."

It is arguable that people coming for family reasons to help their relatives in domestic matters are not covered by the rule above and that they must apply for a work permit or ask for the indulgence of the Secretary of State to admit them into the country right outside the rules. It seems rather tenuous to argue that a person coming for such domestic reasons as helping to take care of children of a family member, whether paid or not, is the same as coming into the country for no more than a visit as the rule above requires.

(b) Students

A passenger seeking entry to study in the U.K. should be admitted if he presents a current entry clearance granted for that purpose. An entry clearance will be granted if the applicant produces evidence which satisfies the entry clearance officer that he has been accepted for a course of study at a bona fide educational institution, that the course will occupy the whole or a substantial part of his time, and that he can meet the cost of the course and of his own maintenance and that of any dependants during the course.¹⁴²

These conditions must be satisfied to the immigration officer at the time of entry in order that he may grant leave to enter. There is no requirement, however, that a student must have an entry clearance if he is to gain admission into the country for his studies. It is always highly advisable to have one, though.

Entry clearance and admission into the country should be refused where the immigration authorities are not satisfied that the above criteria have not been met or where the authorities are doubtful about the student's ability to follow up the proposed study.¹⁴³ Each of the criteria will now be analysed.

Entry into the U.K. will be granted if the immigration authorities are satisfied that the applicant has been accepted for a course of study at a university or college of education or further education, an independent school or any bona fide private educational institution.¹⁴⁴ Problems have arisen, particularly in respect of private and independent educational institutions, as to whether they are bona fide educational institutions for the purpose of immigration law. In KPOMA v HOME SECRETARY¹⁴⁵ the appellant applied for an extension of leave to stay in order to continue attending "a day course in architectural draughtsmanship" at the West End Drawing Office and a letter to that effect was duly produced from the college. Relying on information had that the West End Drawing Office had been giving letters and certificates purporting that certain students were following courses and attending at the "college" when it was in fact known that they were in full time employment, the Secretary of State refused the application for extension saying that the certificates of attendance from that "college" were not acceptable evidence of student status. The Tribunal, upholding the Secretary of State's decision went further than that and said that the course as the evidence showed, could be properly described as supplementary, as students wishing to obtain diplomas or certificates must also attend other colleges or educational establishments. It held further that a course of study must (as the present rules provide)¹⁴⁶ presuppose a termination, whether academically successful or not, of such a course. Study at West End College Drawing Office could apparently go on indefinitely and, accordingly, courses taken there could not be properly called study.

There was no serious effort made in the hearing to determine whether the appellant actually attended the college. The Secretary of State and the appellate authorities were content with simply deciding that the "college" was, in actual fact, bogus and on that basis the appellant was properly refused extension of stay.

This case is an illustration of the doubts in the minds of immigration authorities as to whether an educational institution that has been allowed, legally, to operate in the country should not, in their eyes, be such an institution. Since it is known that these "colleges" take students then it is incumbent upon the immigration authorities to make sure that a student from overseas proposing to join one has knowledge of the fact that a particular institution is not approved for immigration purposes. For this reason it appears reasonable that a list of all the approved institutions should be published to enable students wishing to come to the U.K. to know well in advance whether or not they will be eligible for admission if they join any particular institution of learning. This seems to be the best option if the immigration authorities refuse to recognise certain "colleges". One more thing must be mentioned here. A course of study, according to decided cases and the present rules implies and must be understood to mean, that one must leave when his studies are completed.¹⁴⁷ If this is not the case then leave to enter or remain for the purpose of study will be automatically refused on the ground that one does not intend to leave the U.K..¹⁴⁸

An applicant will be admitted for study if he can satisfy the immigration authorities that his studies will occupy the whole or a substantial part of his time.¹⁴⁹ In other words, with the exception of doctors and dentists, students coming for studies in the U.K. are admitted only as fulltime students and accordingly they must have been accepted for a fulltime course of study. This basically means that entry is not to be granted unless the applicant proposes to spend not less than 15 hours a week in organised day-time study of a single

subject or of related subjects, or if he is taking a correspondence course.¹⁵⁰ If the immigration officer is not so satisfied then he must refuse entry to the applicant.¹⁵¹ Thus an applicant may be granted entry or an extension of leave to stay if he produces evidence which is verified on a check being made, that he will (inter alia) be giving or has been giving regular attendance at his fulltime course of study, but if an application has been refused due to a failure in giving regular attendance to a fulltime course of study an applicant cannot succeed on an appeal against that ground of refusal by showing that his attendance since the refusal of his application has improved.¹⁵²

The 15 hours rule has been held not to be inflexible.¹⁵³ Exceptions are therefore envisaged in appropriate cases like the case in which a journalist student was spending less than 15 hours at his school of journalism where he was enrolled as a fulltime student.¹⁵⁴ Accordingly each case will be decided on its own facts for the determination of whether the 15 hours rule applies to it or not. This is a rather arduous task and it would be more convenient and certain if educational institutions were left to determine or/and certify that a programme of study was a fulltime course of study. This presupposes, also, a list of institutions approved by the immigration authorities as institutions of education or learning. If this were done then cases that might have to go to the appellate authorities on the 15 hours issue would drop dramatically.

The 15 hours rule is of course purely arbitrary. It is a hurdle in the way of foreign students. It is not uncommon to find U.K. nationals who are fulltime students spending less than 15 hours a week in organised day-time study of a single subject. Why it should be desired that foreign students should spend more than 15 hours a week when home students spend less than 15 hours a week in the same subject is motivated by anything^{other} than the desire to make foreign students to

work harder or more. Such a rule makes the law seem biased and shallow. It is submitted that the best option is for the colleges approved to be left free to certify whether a course of study is fulltime or not. It is a short cut to arriving at the meaning and ~~rather~~ scope of the 15 hours rule/by exceptions and "undistinguishable distinctions".

A student coming to do a course of study by correspondence will be refused entry.¹⁵⁵ The exact meaning of a correspondence course is not clear but it has been held that a school run on a correspondence course basis but with facilities available for tutorials on the school's premises and part of the course consisted of outside assignments where a student would be working on his own, falls outside the correspondence course rule.¹⁵⁶ In the absence of a clear definition of what a correspondence course is, it is feasible that the appellate authorities are going to approach the issue, as in the above case, by distinctions and exceptions. This is a problem that could not arise if there was a list of approved institutions. It would save both parties expense and time were such a list made. Above all, there would be a great deal of certainty that a student would be eligible for admission once he has been accepted to join an approved institution.

A student who can meet the cost of his course and of his own maintenance and that of any dependants during the course should be admitted provided he has met other conditions.¹⁵⁷ Actual documentary evidence of the ability to meet the stipulated costs are needed as proof. Thus mere statements of ability to meet the costs of a course and maintenance are not enough.¹⁵⁸ Even where a student can prove that he has sufficient money, if he cannot also show that it is to be applied for his course and maintenance he will be refused entry.¹⁵⁹ Where it can be shown that an applicant who was considered unable to finance

his studies has now adequate means of supporting them, then he will be admitted into the country.¹⁶⁰ An applicant will be refused entry where (inter alia) he cannot show that he will be able to support and maintain himself after completing his studies should he wish to stay for a longer period than his course takes.¹⁶¹

A student must therefore show that he is in possession of sufficient funds for his studies and maintenance (together with those of his dependants if any) or show that other arrangements have been made to provide for his expenses. Sufficient funds means that you have enough money to enable you to complete your course of studies and maintain yourself without resorting to employment to defray your expenses.

Ability: In all other cases the immigration authorities must refuse entry if they are not satisfied that an applicant is able and intends to follow a fulltime course of study and to leave the country at the completion of it. In assessing the case the officer should consider such points as whether the applicant's qualifications are adequate for the course he proposes to follow and whether there is any evidence of sponsorship by his home government or any other official body.¹⁶² This rule raises two fundamental issues, namely, the ability of the student to follow his course of study and his intentions.

Ability, according to the rules, means his intellectual and financial ability to pursue his studies. Finance has already been discussed above. As to intellectual ability an immigration officer has power to set himself up as a judge and can reject a student if he thinks that his ability is wanting in any way. Thus in one case the entry certificate officer refused an entry certificate to an Indian student admitted to a course in cost and works accountancy at a London College because of (inter alia) the student's halting English.¹⁶³ Obviously,

it is unacceptable that immigration officers should make such judgments on educational standards of students, which is something they are not trained for. This is one of those things that the educational institutions themselves are best qualified to do.

The extent to which this rule on ability goes is illustrated by the case of HOME SECRETARY v VIRDEE.¹⁶⁴ In that case Virdee had left school without sitting her 'O' levels in Kenya in 1969. In 1970 she studied typing and book-keeping in Nairobi. In June 1971 she applied for an entry certificate to enable her to attend a 16 weeks course in computer programming at an institute operating commercially in the U.K. She produced correspondence from the institute showing that she had passed an aptitude test for the proposed course, but there was no evidence about the test itself.¹⁶⁵ Her entry into the U.K. was refused mainly on the ground that there was an obvious lack of correspondence between her previous attainments and the nature of the proposed course. Therefore a lack of formal educational qualifications is sufficient to justify a refusal of entry. It is obvious however, that possession of formal educational qualifications is not a pre-requisite, leave alone a condition, to a person following a new course.

It is also self-evident that a student who wants to come to the U.K. to study English exclusively should not be expected to have any credits or formal educational qualification in the language, and should be, if he has satisfied the conditions, admitted.

Whether or not a student will leave the country on the completion of his studies is tied up with the intention of the student. For this reason many decisions on students have been on the intention of the applicants. An applicant is expected to have a genuine intention, and ~~the~~ only ^{the} intention, of pursuing his studies at the end of which he

must leave the U.K.¹⁶⁶ In various decisions immigration officers look at the immediate as well as future intentions and the prospects of an applicant both at this home country and in the U.K. If for any reason connected with such plans an immigration officer comes to the conclusion that an applicant's intentions are not genuine then he will refuse entry. Intention is a question of fact; the mere fact that an immigration officer entertains doubts about the true intentions of an applicant does not constitute a sufficient reason upon which it can rely in refusing entry. Thus the fact that an applicant had no plans for subsequent employment in India, a country with a high percentage of unemployment was not, without more, sufficient to support a refusal of entry on the ground that the applicant's intentions were not genuine.¹⁶⁷ Also the fact that an applicant wishing to study in the U.K. has done nothing during the 18 months following completion of 2 years of his 3 year diploma course and all the members of his family save one are settled in the U.K. does not constitute, on its own, a ground for refusing entry based on a mere suspicion that his intentions are not genuine.¹⁶⁸ In another case it was held improper for the immigration officer to refuse admission to an applicant on the ground that his intention was not realistic because his English was indifferent and his prospect of finding a job virtually nil.¹⁶⁹

All the above matters are indeed relevant and important in determining whether an applicant's intention is both genuine and realistic but they are not on their own and without other evidence sufficient to justify a refusal of entry.¹⁷⁰ Although the words "genuine and realistic" when used in reference to intention do not appear in the present rules it had been held that they nevertheless must be read into the rules because, for any applicant to be admitted, he must be genuine and the connection between genuineness and realism was necessary because while one might genuinely wish the impossible, it

was sensible that only those applicants whose wishes were capable of fulfilment and intended to be fulfilled - i.e. realistic wishes - should be admitted, and also because while an application might be realistic, it could at the same time be a deceit simply to gain admission on a false pretence of study.¹⁷¹ This is clearly not the case now as it has been held by the Divisional Court of the Queen's Bench that since there is no reference to any question that the applicant's intentions should be "realistic" it is not a ground of refusal and it is not therefore open to any immigration officer to refuse entry upon it.¹⁷²

On the balance, the refusal of entry on the ground of intention is less strict in the case of students than in the case of visitors. That one's intention is not genuine or realistic is not a ground for refusing entry to students now. However, as L. Grant and J. Constable have noted, in a series of subsequent cases, the tribunal while holding that "realism" is not a valid ground for refusal of entry into the U.K. has refused entry to students on the ground that the intention to study was not genuine because of the risk that the student would fail to leave at the end of his studies.¹⁷³ Thus in two subsequent cases it has been held that although "realism" was ruled out as a ground of refusal, it was still open to an immigration officer in assessing whether an application is genuine to take into account factors which would also have to be considered when assessing whether an application were realistic. In the words of the tribunal it is open to the immigration officer "... to consider why the applicant wants to attend the course at all".¹⁷⁴

That an immigration officer should want to know why a person wants to do any course at all not only brings, albeit indirectly, the search for realism (which is unlawful) but also seems to be wrong in principle. A person may want to do a course for reasons of securing a certain job or for reasons of personal satisfaction or even self-

aggrandisement. A person may also want to do a course because he intends to change his career in the future. To require an applicant to, for example, produce a letter from his present employers that a particular course would be "acceptable" for employment with them would in the circumstances seem wrong. Yet a person has been required to do just that as a test of his genuine intention.¹⁷⁵

Genuine Intentions: It is also firmly established that a student whose intentions are not genuine and "realistic" will be refused entry on the ground that he does not intend to leave the U.K. at the end of his studies.¹⁷⁶ How is the fact that a student does not intend to leave the U.K. on the completion of his studies determined?

Firstly, it has been held that to propose that a child of 8 years is to start going to school in the U.K. and remain there until he has done his 'A' levels is to propose that he should remain in the U.K. permanently and that this is the only reasonable intention that can be inferred in the circumstances.¹⁷⁷ In this case it was also held that the intention of the child was that of those in charge or in control of the child. This case read together with ISLAM v HOME SECRETARY¹⁷⁸ in which the 5 year rule was held to be a relevant consideration when considering whether a student would return home on the completion of his studies, would suggest that it is now no longer possible for a student seeking entry to do a course lasting more than 5 years to be admitted. It has been submitted by L. Grant and J. Constable that there is nothing in the Immigration Act 1971 or the rules made thereunder to show that the legislature intended to prohibit long term education, at least of that nature.¹⁷⁹

A student whose primary purpose and, in fact the only purpose, for wishing to come to the U.K. is not to follow a fulltime course of study will be refused entry on that ground.¹⁸⁰ In that case the student will

be said not to intend to leave the country at the end of his studies and accordingly his intentions are said not to be genuine. A mere suspicion, however, that a fulltime course of study is not intended, or is not the primary purpose, will not of itself without evidence be a sufficient ground for refusal of entry.¹⁸¹

It has also been held that in an application to attend a computer operator course the applicant's background, the enquiries he had made about other suitable courses locally, and the employment prospects in the computer field on his return home, might well be material factors which an entry clearance officer would need to consider in deciding whether he could be satisfied that the applicant intended to follow a course and to leave the country on completion of it.¹⁸² Thus a student has been refused entry on the ground (inter alia) that even if she obtained any benefit from her course in the U.K. she would not be in a position on her return to East Africa to obtain satisfactory employment in that field.¹⁸³ That being so her intention for coming to study in the U.K. can be anything but genuine.

It is difficult to avoid the conclusion that if an immigration officer wants to refuse a student entry it is effectively within his power to do so by taking into account anything, for example any of the above reasons, that shows a student's intentions are not genuine and accordingly he does not intend to leave the country at the end of his studies. From the cases above and others it can be safely concluded that the task of the appellate bodies in the area of "intention" is simply to determine whether any fact relied on by the immigration officers was or was not a relevant consideration.

There is one area where "realism" is still operative. A passenger who satisfies an immigration officer that he has genuine and realistic intentions of studying in the U.K. but cannot satisfy the preceding

requirements may be admitted into the U.K. for a short period.¹⁸⁴ If realism is defined as wishes which are capable of fulfillment¹⁸⁵ then it is true to say that the rule will be applied only in very few cases. A person who so satisfies the immigration officer may be admitted only for a short time (normally 3 months) with a prohibition on the taking of employment and should be advised to apply to the Home Office for further consideration of his case.¹⁸⁶

A person who holds an entry clearance that is current¹⁸⁷ and fulfils the above requirements may be admitted for a period of up to 12 months depending on the length of his course of study and on his means, with a condition restricting his freedom to take employment. Bona fide students may be allowed to work in their spare time or during their vacations but they must first of all seek the approval of the Department of Employment.¹⁸⁸ Their wives are free to take employment at any time and earnings accumulated from there are taken into account in assessing the student's adequacy to finance his studies and maintain himself.¹⁸⁹ The children of such bona fide students who are under the age of 18 years should, like the wives, be given leave to enter for the period of the authorised stay. Their freedom to take up employment should not be restricted either,¹⁹⁰ but there is no mention that their expected earnings may be taken into account in assessing the adequacy of the means of the student to support himself. Since the earnings of the wife are specifically so mentioned, it is submitted that that of a child under 18 will not be taken into account for purposes of assessment of the ability of the student to support himself. The reason for this omission is dubious.

There is an assumption in the rules that a married student will always be a male. Thus no provision is made for a wife who is accompanied

by her husband to the U.K. for the purposes of study.¹⁹¹ It is submitted that a man accompanying his wife in such circumstances should be treated on the same basis as that of the wife accompanying a husband coming to the U.K. to study.

Renewal of Stay For Students: Extensions of stay to students or would-be students following admittance may be granted if the applicant continues to satisfy the conditions upon which he was admitted. Thus when applying for an extension of stay a student must show by evidence that he is giving regular attendance at a fulltime course of day-time study.¹⁹² If an application has been properly refused due to the applicant's unsatisfactory attendance record, he cannot succeed on an appeal against that ground of refusal by showing that his attendance since the refusal of his application has improved.¹⁹³ In other cases applications for extension of stay have been refused because students had taken employment without first getting the authority to take employment and thus being in breach of their entry conditions.¹⁹⁴

An application for extension is a variation of the conditions of stay within the meaning of the rules¹⁹⁵ and can only be given if strict compliance with the conditions of admission has been made. Thus a student must produce evidence, which is verified on a check being made, that he is still enrolled for a fulltime course of day-time study which meets the requirements for admission as a student, that he is giving regular attendance and that he has adequate funds available for his maintenance and that of any dependants. When an extension is granted a student may be reminded that he will be expected to leave at the end of his studies. It has been decided in one case that when considering an extension of stay fresh evidence of admission into another college cannot be taken into account if it was not before the immigration officer.¹⁹⁶ However, this case does not lay a hard and fast rule on that issue and the tribunal has clearly stated that each case will be considered

individually according to its facts.¹⁹⁷ In the case it was held that the new course represented a project which materially altered his original application and therefore formed a basis for a new application.

In the THE HOME SECRETARY v SIDIQUE¹⁹⁸ consideration was given by the tribunal to the submission that the Home Secretary had, by granting an extension of stay to a student, condoned a breach of the student's conditions. The Home Secretary had in 1973 granted an extension of stay for study purposes notwithstanding that the student applicant had overstayed by 9 months his limited leave to enter for 12 months. It was submitted for the student that when he was in breach again, by overstaying 6 months, his first breach had been condoned, overcome or forgiven, and in the present circumstances of his satisfactory studies that earlier breach could no longer be held against him in a new application for an extension of stay. The tribunal found no difficulties in coming to the conclusion that the first extension that was granted to the student amounted to no more than "... being given another chance and in no way (meant) that he was being given, so to speak, a clean slate. The immigration rules do not provide for the condonation, in the sense of full forgiveness, of the past immigration offences, though if (the applicant) had not been in breach of the immigration rules afresh, the Home Office would have had no reason to refer to the matter again."¹⁹⁹ Thus students applying for an extension cannot rely on the mistaken belief that having been in breach of the immigration rules and got extensions notwithstanding, the Home Office will not take into account their past conduct when they have been in breach of the conditions of stay afresh.

Note on Medical Students: Mention must be made of doctors, dentists, midwives and nurses. They are admitted for training if they have "student" entry clearances unless they have been obtained by misrepresentation or concealment of material facts. Doctors and dentists are admissible for fulltime postgraduate study even though they also intend during their stay to seek employment in training posts related to their studies.²⁰⁰ This class of medical personnel enjoys a rather special exclusion of not having to satisfy an immigration officer that they will not work during their training. The onus on them of showing that they will be able to meet the costs of their training and maintenance are less onerous than ~~other~~ ^{that on other} students simply because they are allowed to work. In all other respects doctors and dentists coming for postgraduate studies and nurses and midwives coming for training or postgraduate studies, are required to satisfy the same requirements as those that other students have to satisfy. They are also subject to the same conditions as other students in matters connected with variations of their conditions of stay.

The rules state that "applications from students or would be students for variation of their leave consist mainly (my emphasis) of applications for extension of stay as a student."²⁰¹ It has been held by the tribunal that in the absence of any word in the rule above showing that applications for extension will not be considered, the word "mainly" used in that rule provided a discretion whereby other applications by students might be considered.²⁰² Thus a young commonwealth citizen who was admitted to the U.K. in a student capacity properly applied for a variation of his conditions of stay to enable him to stay in the different capacity of a holiday worker provided he satisfied the immigration officer that he intended to take only employment which will be incidental to his holiday.²⁰³

The above case is authority for a submission that a student may

apply for a variation of conditions of his stay both as to the length of time of stay and as to any other capacity, e.g. visitor, holiday-worker etc., for which no work permit is required.

~~(14)~~ "Au pair" Girls

According to the immigration rules "au pair" is an arrangement under which a girl of 17 and over may come to the U.K. to learn the English language and to live for a time as a member of a resident English-speaking family.²⁰⁴ An "au pair" arrangement must be distinguished from fulltime domestic employment for which a work permit is required.²⁰⁵ When an immigration officer is satisfied that an "au pair" arrangement has been made he may admit the passenger for a period of up to 12 months with a restriction on her freedom to take employment.²⁰⁶ An "au pair" girl is first admitted for 12 months with a restriction on her freedom to take employment.²⁰⁷ If at the end of the 12 months she goes home, she may return for a second term of 12 months of "au pair" arrangement but no more.²⁰⁸ There is provision for an "au pair" girl to apply for an extension of her stay. She will be granted an extension of 12 more months if the immigration officer is satisfied that there is a "satisfactory au pair arrangement" in being.²⁰⁹ They cannot, however, be allowed to stay longer than 2 years. There is absolutely no right or discretion under which an "au pair" girl may apply to vary her status to a different capacity, e.g. to that of a visitor or student.²¹⁰

A number of things call for comment. Firstly, a male person cannot be admitted into the U.K. on an "au pair" arrangement. It has been held that the immigration rules make no provision upon which a male applicant can be permitted to stay in the U.K. on an "au pair" basis.²¹¹ This is therefore sexually discriminatory.

Secondly, it has been held that in order to comply with the rules on "au pair" girls an applicant is impliedly²¹² required to show that

the proposed "au pair" arrangement is the sole purpose for which she wishes to visit the U.K..²¹³

Thirdly, there is no definition of the term "... a resident English speaking family".²¹⁴ The U.K. has now become a multi-racial society in which English is spoken by most "families". It is submitted, as a principle that will contribute to racial harmony and integration, that the term should mean any "family" in which at least one member speaks the English language provided, of course, the "family" is resident in the U.K.. The term "family" must be liberally interpreted to include a single person living alone or with others.²¹⁵

(iv) Persons Coming for Employment, or Business or as Persons of Independent Means

This category of non-patrials is comprised of quasi-workers (i.e. trainees, Commonwealth citizens with U.K. ancestry, young Commonwealth citizens and permit-free employees), workers, businessmen, people of independent means and self employed passengers.²¹⁶ Each of these categories of people will be examined now.

(1) Quasi-workers:

(a) Trainees: A trainee must be in possession of a valid work permit from the Department of Employment for training in a specific job in some profession or employment.²¹⁷ For non-Commonwealth and non-E.E.C. nationals the "training" period may be used to widen one's knowledge of the English language.²¹⁸ A trainee will be admitted into the U.K. for 12 months or for the period of the training, whichever is the shorter, if he has complied with all the other conditions.²¹⁹ Immigration officers must impose a condition restricting trainees to an approved employment and transfers to ordinary employment will not be allowed under any circumstances.²²⁰ A trainee who applies for an

extension of stay in order to complete his training for which he was admitted will be granted the extension if the Department of Employment report that he is continuing his training satisfactorily in the case of a Commonwealth citizen, or in the case of non-Commonwealth and non-E.E.C national, that there are exceptional circumstances and the Department approves the proposed extension.²²¹

A number of problems, particularly on applications for extension of stay have arisen in the past. In HOME SECRETARY v BRIZMOHUN,²²² B. was admitted to the U.K. for 12 months training in signwriting approved by the Department of Employment. Before his leave of stay expired he applied for an extension to enable him to continue his training for a further 12 months with the same firm working for them as an improver. The Secretary of State referred the matter to the Department of Employment who reported that they did not regard the proposed employment as training and accordingly did not recommend an extension of stay. The Tribunal held that the Home Secretary had no discretion to grant an extension of stay if the Department of Employment reported unfavourably on the application concerned.²²³ This case is still a binding authority although it was decided under the old laws. That being so it follows that under the present immigration rules if the Department of Employment report unfavourably on the training of a person then that person's application for extension will not be approved. The corollary of this is that if the Department of Employment rejects any "training on the job" as being training for the purpose of immigration law then a person who has applied to do that training in the U.K. will not be allowed entry into the country. An earlier case sums up the effect of the decision thus: "... it would appear that the Home Secretary has reserved to itself the discretion to refuse an extension of stay notwithstanding that the report of the Department of Employment is

favourable, but should the report be unfavourable the Home Office has no discretion or power to question such a report".²²⁴ Clearly therefore the Secretary of State has no discretion to consider an application for an extension of stay from a trainee if the Department of Employment reports unfavourably. But if the latter reports favourably of the training and says that it is satisfactory then the Home Secretary has discretion to extend or refuse to extend leave of the applicant, having regard to all the circumstances.

An approval or refusal of training schemes in the above cases is the prerogative of the Department of Employment and the decisions of that Department cannot be called into question by the Home Department, and they cannot be the subject of an appeal under the Immigration Appeals system.²²⁵ The Tribunal has ruled that this is the case under the present immigration rules.²²⁶ An appeal will invariably be against the Home Department ~~and~~ if it refuses an extension of stay but no appeal will lie against the Department of Employment if it refuses to approve an extension of stay.²²⁷ It has been submitted that this represents one of the most serious defects in the Immigration Appeals system.²²⁸

The case of AINOUSON v HOME SECRETARY,²²⁹ illustrates some of the complexities that can arise from the requirement that the Home Secretary should consult the Department of Employment for approval. In that case A. entered into the U.K. as a trainee approved by the Department of Employment for industrial training with a named firm. Towards the end of his approved training the firm wrote to the Department of Employment that the appellant wished to remain permanently in their employment and that they were anxious to retain him. The Department informed the Home Office, and on the latter's reference back reported that they did not recommend a further extension as a trainee and considered

the appellant's post to be permanent employment. The Home Secretary accordingly refused the extension of stay. On appeal to the Tribunal it was argued that the Home Secretary should have made a decision and could not shelter behind the decision of the Department of Employment.²³⁰ It was held by the Tribunal that the immigration rules approved by the Legislature set out the way in which the discretion to grant an extension of stay to a trainee may be exercised and the reference by the Home Office to the Department of Employment was made in compliance with the rules.²³¹ This is still the law.²³² This is an illustration of the ease with which trainees can be refused an extension of leave to remain in the U.K. for the purpose of training.

The discretion of the Home Office to extend leave to remain in the U.K. to a student-employee (i.e. non-Commonwealth or non-E.E.C. national) is narrower than that applicable to Commonwealth nationals in the U.K. as trainees. If a student-employee's application for an extension has been approved by the Department of Employment then the Home Office may extend his leave to remain in the country for that purpose only in "exceptional circumstances".²³³ The words exceptional circumstances have not been defined by the appellate authorities but they are certainly stronger than those applicable to Commonwealth trainees whose leave to remain may be granted if "... the Department of Employment report that he is continuing his training and that this is still satisfactory ...".²³⁴ Foreign student-employees are, according to the rules, engaged in a supernumerary capacity and, like Commonwealth trainees, will not be allowed to transfer to ordinary employment.²³⁵

Visitors and students from the Commonwealth countries may be granted extensions to stay as trainees if the Department of Employment considers the offer of training to be satisfactory.²³⁶ Apparently there is no scope for foreign non-E.E.C. students to do this.²³⁷

A Commonwealth visitor or student will not, however, be granted an extension of stay if, (having regard to all other circumstances and the fact that on completion of his training he will have been in the U.K. for more than 5 years with consequent difficulties of removal) the Home Office think it "improper" to do so.²³⁸

There remains the question of how one gets a work permit for the purpose of undertaking a training or student-employee course as they must.²³⁹ An application must be made to the Department of Employment by the "employer" and not the trainee or the student-employee. A permit is restrictive of the "training" and the "employer" and accordingly it is used for a specific "training" to a specific "employer".²⁴⁰ Their admission into the country is strictly on the basis that they must not take any employment.

There is no reference to the admission into the U.K. of the dependants of people coming to do an on the job training or coming as student-employees. However the rules do say that workers admitted for seasonal employment are not allowed to bring dependants.²⁴¹ It is submitted that trainees and student-employees are basically seasonal workers and accordingly their dependants will not be allowed into the U.K. during their limited leave to stay in the U.K.

Foreign non-E.E.C. nationals doing a student-employee course may be required to register with the police.²⁴²

(b) Commonwealth Citizens with U.K. Ancestry: Upon proof that one of his grandparents was born in the U.K. and Islands, an applicant who wishes to take or seek employment in the U.K. will be granted an entry clearance for that purpose. If he has got his entry clearance and is not ineligible to enter on grounds of concealment or misrepresentation of material facts or other grounds outlined elsewhere,²⁴³ then he is exempt from the necessity of having a work permit and will therefore

be admitted into the U.K. indefinitely.²⁴⁴ The above has been strictly applied in the case of C. (an Infant) v ENTRY CLEARANCE OFFICE, HONG KONG.²⁴⁵ In that case C. was an illegitimate child, a citizen of the U.K. and Colonies born in Hong Kong. Her mother did not qualify as a patrial under S.2(1)(b) of the Immigration Act 1971 so as to confer on the appellant a statutory right of appeal, but her natural father had been born in the U.K. and his parents had been born and married there. It was submitted, inter alia, that although C. did not qualify as a patrial she should be granted "indefinite leave to enter" under the above rule because her paternal grandparents were born in the U.K.. The Tribunal quoting Denning L.J. said that "... the law does not recognise the natural father at all. The only father it recognizes as having any rights is the father of a legitimate child born in wedlock."²⁴⁵ On the basis of this dictum and on the basis that modern statutes will provide that a "child" will include an "illegitimate child", whereas the Immigration Act 1971 and rules made thereunder did not do that, the Tribunal was of the view that the rule above²⁴⁷ cannot be taken to include the paternal grandparents of an illegitimate child.

An application by a commonwealth citizen with U.K. ancestry to come into the U.K. under paragraph 27 of H.C. 79 above must be specifically for taking or seeking employment. Thus the rule can have no application where an appellant applies for an entry in order to take or seek employment but specifically to come to the U.K. as a student.²⁴⁸

Aliens, by their very status have no ancestry with the U.K. in the eyes of the law and accordingly there is no provision made for them on the same basis of U.K. ancestry.

The wife and children under 18 years of a Commonwealth citizen with a U.K. ancestry given an indefinite leave to enter the U.K. in order to take or seek employment should also be given leave to enter,²⁴⁹

Their freedom to take employment should not be limited,²⁵⁰ but he must be prepared to support and accommodate them without recourse to public funds.²⁵¹ The wife and children under 18 years of such people must be in possession of entry clearances before they can be admitted into the U.K.²⁵²

(c) Young Commonwealth Citizens on Extended Holidays:

Young Commonwealth citizens who come to the U.K. for extended holidays of up to 5 years before settling down in their own countries who satisfy the immigration officer that they intend to take only employment which is incidental to their holiday, should be admitted for 12 months and should be advised that it will be open to them to apply for extensions of stay within the maximum of 5 years allowed.²⁵³

In one case²⁵⁴ a young Commonwealth citizen from Australia was admitted into the U.K. in 1967 for 12 months. Under Comnd. 4298 para. 29(d) of the old rules he did "... not require employment vouchers" if he was (as he was) "... a person whose employment will be only incidental to a holiday". He was, in other words, a holiday worker as young Commonwealth citizens on an extended holiday are referred to. Extensions of his stay were subsequently granted to the appellant, but in August 1970 an application to extend her visitor's leave to stay was refused on the ground that her stay in the U.K. had been in the nature of a working holiday and the maximum period then allowed under the working-holiday scheme was 3 years. The Tribunal upheld this.

The period of stay permissible now is a maximum of 5 years. It follows from the holding above that no holidayworker will be allowed to remain in the U.K. beyond that time.

It had been held under the old Rules that a person admitted as a visitor could not be considered as a holidayworker as he was not

admitted as such.²⁵⁵ This is no longer true, apart from the fact that the Tribunal did not consider the rule providing that "... a visitor who wishes to stay here (in the U.K.) in some other temporary capacity e.g. as an "au pair" girl or as a student may be granted an extension on request ...", if the other requirements of stay are met."²⁵⁶ In BAIJAL v HOME SECRETARY,²⁵⁷ it was held that in the light of the provision that a visitor may be granted an extension of stay in some other temporary capacity on request it would not be proper to construe paragraph 11 of H.C. 80²⁵⁸ as meaning that an extension of stay as a working holidaymaker can be granted only to persons whose original entry to the U.K. was in that capacity. That rule in paragraph 11 of H.C. 80 must now be construed as applying to people who came into the U.K. as holidayworkers initially and does not apply to other classes of people admitted into the U.K. e.g. visitors and students. Thus it has been held that a Commonwealth citizen who came to the U.K. in a student capacity may properly apply for a variation of his conditions of stay as a student to enable him to stay on in the different capacity of holiday-worker.²⁵⁹

What is the meaning of the phrase "employment which will be incidental to their holiday ..." in paragraph 28 of H.C. 79? A person coming into the U.K. as a holidayworker must have as his primary purpose a holiday with employment only incidental to it.²⁶⁰ Accordingly to be a genuine holidayworker a person must initially have some resources with which to finance his holiday, augmenting such resources from time to time by taking employment, the Tribunal has so held.²⁶¹ In GUNATILAKE v ENTRY CLEARANCE OFFICER, COLOMBO,²⁶² it was held by the Tribunal that to obtain a full-time employment for a period of 2 to 3 years, rather than to take a job or jobs that would be occasional and subordinate to holiday-making, did not qualify a young Commonwealth

citizen for entry into the U.K. as a working holiday-maker on an extended holiday under the above rule. The evidence against the appellant was that he had given up his hotel job a month before his intended visit to the U.K. and he was looking for any kind of job during his stay in the U.K. for 2 to 3 years. It appears from this case that a full-time job for the intended stay in the U.K. cannot be considered as incidental to a holiday, a fallacy which seems to imply that holiday work means either doing nothing but spending money or an engagement for a series of jobs at different times and probably in different places. It is submitted that a full-time job is wholly consistent with a holiday and is not inconsistent with the bringing of money from an "initial resource" to finance one's holiday. If this is not so, as implied by the case above and others,²⁶³ then employment incidental to a holiday may also mean a part-time job (as opposed to full-time). The criterion must be, in the final analysis, the reason for which such a person is here and on whether the job he is doing or intends to do is a full-time one or not. A person can only be regarded as being in full-time employment in the sense that he must have a work permit if he stays beyond the limited period of 5 years.

Young Commonwealth citizens do not need work permits for the jobs they will take when in the U.K..²⁶⁴ The only problem remaining is that there is no definition of the word "young" and this probably must be construed from the point of view that on his return to his home country the person is going to settle down. There is nothing in the rule to suggest that it applies only to men. It is submitted that there is nothing in this rule giving power to the immigration officers or the appellate authorities power to look at the past settled state of a person which no longer exists if he can satisfy the other requirements.

The Rules are, curiously, silent on whether a young Commonwealth citizen who comes to the U.K. can bring his/her spouse with him/her and their children under 18 years. The key to this problem and the preceding submission must surely hinge on the term "settle" as used in the Rules. There is no comprehensive meaning of that word. Under the Immigration Act 1971, it is defined in relation to the U.K. and the Islands only and the definition will be irrelevant in connection with other Commonwealth countries. The word may be lacking from the vocabulary of some Commonwealth countries when used in the sense that the Rules use it. The solution to the problem would be to take the meaning of the term in common parlance. According to the Chambers Twentieth Century Dictionary the word settle means, among other things, to set up, to establish or install e.g. in residence, business, marriage, a parish, etc; and to take up permanent abode. It is submitted that the latter meaning comes nearest to the situation of a young Commonwealth holidaymaker because the former meaning would imply that such a person has no "... initial resources of income with which to augment his holiday..." according to the Tribunal. Also the former meaning would necessitate arbitrary and illogical distinctions, for example, that a married man is settled but a man with a business from where he gets money to augment his holiday is not settled.

If that submission is correct, then it is further submitted that young Commonwealth citizens can by virtue of paragraphs 37 and 39 of H.C. 79 bring their spouses and children under the age of 18 years old if he/she can support and accommodate them.²⁶⁵ If the above submissions are wrong then it follows that young Commonwealth citizens doing jobs incidental to their holidays must be unmarried. But if their spouses can come then unlike those coming for settlement

it is not mandatory for them to have an entry clearance.

(d) "Permit-Free" Employment: There are eleven classes of people who may come to work in the U.K. without a work permit. They are admitted for an appropriate period not exceeding 12 months if they hold a current entry clearance granted for that purpose or other documentary evidence that they do not require permits.²⁶⁶ These classes of people are:

(1) Ministers of religion, missionaries and members of religious orders coming to work as such, including those engaged in teaching. It has been held that there is no provision in the Rules for persons admitted as visitors to be allowed to remain as priests.²⁶⁷ This dicta was arrived at following the general provision of H.C. 79 paragraph 5 that people admitted as visitors or students or for other temporary purposes have under the Rules no claim to stay in employment. As priests, and for that matter all "permit-free" people, are admissible into the U.K. if they hold a current entry clearance granted for the purpose or other documentary evidence that they do not require permits it followed that if H.C. 79 paragraph 5 above was to be given effect, a visitor into the U.K. could not be granted leave to stay on as a priest. It is submitted that the Tribunal's decision was made per incuriam because no reference was made to paragraph 9 of H.C. 80 which provides that a "... visitor who wishes to stay (in the U.K.) in some other temporary capacity ... may be granted..." leave provided he has requested it and meets the conditions of his new proposed capacity.²⁶⁸

The provision on religious people is widely phrased and in its present form it includes not only a Minister i.e. a person duly authorised by a religious denomination to conduct religious worship and perform other religious rites, but also a lay preacher, a nun,

lay brother and cantor.

There is no requirement that any religious denomination must be an organisation already established in the U.K. nor is there any requirement that the person must have been practising his religious vocation before coming to the U.K.. However, it is open to the immigration authorities to refuse entry to a person coming to the U.K. for such religious purposes if the religious organisation he is coming to or intends to start is considered socially harmful.²⁶⁹

(2) Doctors and dentists coming to take up professional appointments: These are admitted for 12 months and do not need work permits. However, doctors who do not have a definite appointment to come to may be allowed in for an initial period of 6 months if they are to take attachments under the Department of Health and Social Security Scheme or, if they are exempt from it, they have come to take up hospital employment as doctors.²⁷⁰ Also dentists holding current entry clearances issued to them with a view to their seeking employment in or practising their profession in the U.K. should similarly be admitted for up to 6 months.²⁷¹

(3) Private servants of members of diplomatic servants;

(4) People coming for employment by an overseas Government or in the employment of the United Nations or other international organisation of which the U.K. is a member;

(5) Representatives of overseas firms which have no branch, subsidiary or other representative in the U.K.;

(6) Representatives of overseas newspapers, news agencies and broadcasting organisations, on longterm assignment in the U.K.. There is no definition of "longterm" but presumably it means a

representative who is in the U.K. on assignment for a period which amounts to something more than a casual or temporary assignment;

(7) Teachers and language assistants coming to schools in the U.K. under exchange schemes approved by the Education Departments administered by the Central Bureau for Educational Visits and Exchanges or the League for the Exchange of Commonwealth Teachers;

(8) Seamen under contract to join a ship in British waters. According to Immigration Act 1971, s.8(1) Seamen who are crew members of a ship in British waters are to be freely admitted unless they are subject to a deportation order, or they have been previously refused leave to enter and have not since that time been given leave to enter or remain in the country, or unless they are required to submit to medical examination. The word "crew" is defined as "... persons actually employed in the working or service of the ship ...".²⁷² It has been held that a person listed in a ship's articles as a stewardess but not actually involved in the operation or service of the ship and whose sole purpose is to accompany her husband for a round trip falls outside people for whom the above provisions were made.²⁷³

It is submitted that services required in such ship must be taken into consideration. Thus a beautician or saleswoman employed on board a luxury liner or as an electrician employed on board a cable ship or a chemist employed on board a whale ship should be classified as providing services to the ship and therefore crew members.

(9) Operational staff (but not other staff) of overseas-owned airlines: these include only crew members of a plane, following the definition of crew, which is "... persons actually employed in the

working or service of ... (an) aircraft".²⁷⁴ It would follow that a person not required for the normal operation or service of an aircraft will not be allowed to come in freely;

(10) Persons coming for employment in a Government department, who hold a special Employment Form from the Department of Employment; and

(11) Seasonal workers at agricultural camps under approved schemes. This scheme is not available to Commonwealth citizens however.

Some general matters must now be noted. For any of the above people to get an entry clearance enquiries must have been made in the U.K. as "... to the need for such an appointment and similar matters".²⁷⁵ Should the enquiries be favourable the applicant will be issued with an entry clearance.

Department of Employment: These are authorities indicating that where a person subject to the immigration law in a capacity other than a "permit-free" capacity, e.g. as a visitor or a student, wishes to take a "permit-free" employment then the Secretary of State will be acting in compliance with the immigration law if he refers the matter to the Department of Employment for approval of the employment.²⁷⁶ It is not clear however whether or not the Secretary of State may under the present rules legally refer on enquiry for employment of a person seeking to come into the U.K. for that employment which is also a "permit-free" one. If immigration law is considered, as it will well be in this case, as an aspect of economic policy geared towards filling specific gaps in manpower, then it appears right that the Secretary of State should refer any question of employment to the

Department of Employment for approval before authorising the issue of an entry clearance to an applicant. That it seems right to do so does not, of course, make it legal. If however it is referred to the Department of Employment the effect of it would be that a person looking for a "permit-free" employment if refused an entry clearance following the refusal of the Department of Employment to approve the employment will have no right of appeal under the appeals system.²⁷⁷ Where however refusal for a particular employment which is categorised as "permit-free" is made without reference to the Department of Employment, then a person affected by that refusal may appeal normally against the refusal.

People admitted into the U.K. as visitors have no claim under the Rules to remain there in employment.²⁷⁸ It has been held that it applies to a priest whose subsequent employment was a "permit-free" one.²⁷⁹ It has already been submitted that this decision is wrong but while it remains in force it would appear that any person who comes into the country in any temporary capacity will not be allowed to take a "permit-free" employment unless there are "... exceptional circumstances, such as strong personal and compassionate reasons or reasons involving an aspect of vital public interest".²⁸⁰ This is a very heavy onus on the applicant and it is safe to assume that most visitors will not be allowed to go into "permit-free" jobs. The option therefore is to come in as a "permit-free" person.

Extensions of Leave: No provision for an extension of stay for "permit-free" workers is made in the Rules. It has been held that the omission of the extensions is a deliberate act.²⁸¹ That being so it seems that "permit-free" workers are subject to paragraphs 5 of H.C. 80 and 82 which provide that in cases where people are admitted with no condition imposed restricting employment and

"... the Department of Employment is prepared in the particular case to approve the proposed employment, an appropriate extension of stay may be granted; if not an extension must be refused".

The effect of the above provision is that at the end of the 12 months for which a "permit-free" person is initially admitted into the country he must apply to the Home Office for an extension of stay. The Home Office must refer the matter to the Department of Employment who will either approve or refuse the employment. If it is refused that will be the end of the matter. If, however, it is approved the Home Office has a discretion either to grant the extension or refuse it. In the latter case the Home Office must give reasons for refusing to extend leave of stay²⁸² and the applicant has of course, a right to appeal under the immigration appeals system.

A crew member who has been given leave to enter to join a ship or aircraft or who has been given leave to enter for hospital treatment, repatriation or transfer to another ship or aircraft in the U.K. should be granted an extension to stay only when that is necessary to fulfil the purpose for which they were given leave to enter.²⁸³ There may however be a removal of the time limit of stay in the U.K. if he marries or comes to marry a woman settled in the U.K. as will be seen later.²⁸⁴ This applies to women as well as men.²⁸⁵

Wives and Children: The wives and children under 18 years of a person "admitted to seek employment" should be given leave to enter for the period of the applicant's authorised stay.²⁸⁶ It is submitted that people "admitted to seek employment" include "permit-free" workers and accordingly their dependants are admissible. Their freedom to take employment should not be prohibited unless the applicant is himself prohibited to take employment. The Rules refer

to the "wives" of people admitted to seek employment. By this is meant that the husband and children of a woman allowed to come into the U.K. to seek employment will not be admissible to join her. This is another aspect of sexual discrimination.

(2) Workers:

All other persons who wish to come and work in the U.K. and have no right of abode must have a work permit²⁸⁷ issued by the Department of Employment before they can be allowed to work.²⁸⁸ If such a person has not got a work permit leave to enter must be refused without more.²⁸⁹ A work permit is issued to an employer on application by him and is only for a specific post with that particular employer. The employer must show that he has made every effort to find a suitable worker in the U.K. without any success before his request can be granted.²⁹⁰

There is a limited number of categories of employment for which work permits may be issued e.g. professional, executive and skilled craftsmen, workers in hospitals, and others "if in the opinion of the Secretary of State for Employment their employment is in the national interest".²⁹¹ Permits for skilled and semi-skilled jobs are available to citizens of Malta and Dependent Territories.²⁹² In both categories a person must be between the ages of 18 and 54 inclusive to be entitled to a work permit.²⁹³

A work permit is not an entry clearance although it may enable a person who is to appeal against a refusal of leave to enter/while he is in the U.K;²⁹⁴ just like a person with an entry clearance. It is advisable for a person with a work permit to have an entry clearance as well. In either or both cases the immigration officer has a discretion to refuse him entry if the immigration officer's

examination reveals some good reason for so doing e.g. where false representations have been employed or material facts have been concealed, whether or not to the applicant's knowledge, for the purpose of obtaining the work permit or the entry clearance or both, or the applicant's age puts him outside the limits for employment, or he does not intend to take the employment specified or is not capable of doing so.²⁹⁵ Under this Rule immigration officers have considerable discretionary powers to refuse entry but they must, in doing so, confine themselves to the grounds that can be found in the Rules, for there is no "good reason" if it is not in the Rules or any other directions given by the Secretary of State.²⁹⁶

A person whose work permit's period of validity has expired on his arrival may nevertheless be admitted into the country if the immigration officer is satisfied that circumstances beyond his control prevented his arrival before the permit expired and that the job is still open to him.²⁹⁷ This means, by necessary implication, that if the job is no longer open to him he must be refused entry and presumably he has no right of appeal against the refusal or if he has a right of appeal then he cannot appeal while he is in the U.K..²⁹⁸

A person with a current work permit will normally be admitted for a period of 12 months with a condition permitting him to take or change employment only with the permission of the Department of Employment.²⁹⁹ At the end of that period an extension may be granted if the applicant is still engaged in the employment specified in the permit, or other employment approved by the Department of Employment, and the employer confirms that he wishes to continue to employ him. Unless there is any special reason to the contrary, the extension should be granted for a further 3 years. Cases where the applicant is no longer in approved employment should be considered in the light

of the relevant circumstances.³⁰⁰ A number of things call for analysis here. In the first place although the Immigration Act 1971 vests the power to admit non-patrials into the country and to vary conditions of such an admission in the Secretary of State and immigration officers, it has been held that the Rules above which provide that the Secretary of State shall consult the Department of Employment are not ultra vires the Act because there is nothing to "... preclude the Secretary of State from providing in the Rules he lays before Parliament, for consultation with another Department before exercising his powers under s.4(1) of the Immigration Act 1971 and it seems entirely appropriate for matters relating to employment to be referred to the Department of Employment".³⁰¹

In fact the Rules do "... not transfer or purport to transfer to the Department the power to give leave to remain there."³⁰² The explanation for the above holdings is that the Secretary of State has under s.3(2) of the Act power to make the Rules. It would be illegal if the Secretary of State made a Rule vesting a discretion vested in him by the Act of Parliament to another Department³⁰³ and accordingly the Employment Department is not vested with the discretion of varying a non-patrial's conditions of stay. All that the Department of Employment is required to do is to approve or disapprove any employment referred to it and no more. This is quite a different matter from when the Department of Employment refuses to approve employment referred to it and the Home Office and appellate authorities in reliance of that refusal do not extend an applicant's leave to stay in that employment.

Other Relevant Matters: There are two things which must be kept in mind when dealing with the power of the Secretary of State to vary conditions of stay. Firstly, there are people who come into the U.K.

in temporary capacities like visitors and students and others like trainees and the "permit-free" people who do not, strictly speaking, come into the country under the work permit scheme.³⁰⁴ There are also people who must have a work permit before they can come into the country and strictly speaking they form the work-permit category. When the Secretary of State is exercising his discretion to vary conditions of stay and the matter is referred to the Department of Employment then different and distinct Rules apply and these have not, from the reported cases, always been kept in mind.

For people who come into the U.K. for temporary reasons and others, like the "permit-free" people, all of whom form the non-work permit class, when the limited time for which they were admitted into the country expires then they must apply for an extension of their stay under paragraph ~~5 and~~ 5 of H.C. 80 and 82.~~respectively~~ Under these Rules applications for employment by people who were admitted into the country subject to a condition prohibiting employment e.g. students, must be refused without reference to the Department of Employment.³⁰⁵ If the Secretary of State refuses a variation without reference to the Department of Employment one has a right of appeal to an adjudicator in the first instance, and the adjudicator must, under s.19(2) of the Immigration Act, consider whether on the facts of the case it was right not to refer the case as is "normal"³⁰⁶ and if not he must consider the matter afresh.³⁰⁷ What the adjudicator seeks to do in reconsidering the matter afresh is to see if there is anything in the circumstances of the applicant's case which constitutes an abnormal situation so as to take it out of paragraphs 5 and 5 of H.C. 80 and H.C. 82 respectively.³⁰⁸ Such abnormal or exceptional circumstances include, for example, strong and personal compassionate reasons,

or reasons involving an aspect of vital public interest.³⁰⁹

The Secretary of State cannot simply refuse an application for variation of conditions without giving reasons. If he fails to give reasons then again the applicant has a right of appeal to an adjudicator, initially, who must apply his mind afresh to the issue.³¹⁰ In either case if the adjudicator finds that there are abnormal circumstances, then he must refer the question of employment to the Department of Employment for consideration.

In cases where a condition prohibiting employment was not imposed then if the Department of Employment (which must be consulted) in any particular case approves the proposed employment, an appropriate extension may be granted but if the Department of Employment refuses to approve the proposed employment then that will be the end of the matter.³¹¹ In any case where the Department approves the proposed employment the Home Office has under the Rules a discretion to refuse to extend leave to stay and in that case there is a right of appeal to the adjudicator.

For people who came into the U.K. as work-permit holders and are accordingly in the "work-permit category", an application for extension of leave to stay and work is made under H.C. 80 and H.C. 82 paragraphs 19 and 17 respectively. Such a person who wishes to apply for an extension of his stay may be granted the extension if he is still engaged in the employment specified in the permit or other employment approved by the Department of Employment, and the employer confirms that he wishes to continue to employ him. Unless there is any special reason to the contrary, the extension should be for a further 3 years. Cases where the applicant is no longer in approved employment should be considered in the light of all the relevant circumstances.³¹² In this Rule too there is no discretion

vested in the Department of Employment by the Secretary of State. All that the Department of Employment is required to do is to approve any particular employment and then the discretion of whether to refuse or extend leave of stay reverts to the Secretary of State. Unlike cases of people who come into the U.K. in a temporary capacity when, in the case of work-permit holding people, the Department of Employment refuses to approve a job it does not necessarily mark the end of the matter for paragraphs 19 and 17 above give the Secretary of State and the appellate authorities discretion to consider the case "in the light of all the relevant circumstances". The Secretary of State and the appellate authorities do not have this discretion in the case of people in the U.K. in a temporary capacity who have applied to work and the Department of Employment has refused to approve the employment. The Tribunal has, however, refused to exercise the discretion in favour of an applicant who was a work-permit holder and who was applying for a variation of leave to do a job in a mental hospital; a job which was of great value to the community and for which there were great difficulties in recruiting staff.³¹³ The Tribunal was of the view that the words "relevant circumstances" in paragraphs 19 and 17 above related to matters outside the question of employment, such as the exercise of a discretion on compassionate grounds affecting the applicant, and they had nothing to do with the nature of the employment involved. The effect of this decision is that an applicant cannot appeal merely on the ground that the Secretary of State has exercised his discretion unreasonably in refusing a variation of conditions where the Department of Employment has refused to approve a particular employment. An applicant can only appeal on the ground that his particular circumstances are

such that having regard to his exceptional circumstances he should be considered for a variation of leave to stay. He has a right of appeal to the appellate authorities should the Secretary of State not be able to think, in that case, that the applicant has no special or exceptional circumstances or strong personal compassionate reasons. It follows from this also that the decision of the Department of Employment to refuse to approve a particular employment remains final and there is no appeal against it.

Wives and Children: The wife and children under the age of 18 years of a person with a work permit admitted into the U.K. should be given leave to enter for the period of his authorised stay and their freedom to take employment should not be restricted unless the head is himself restricted. In this case also the husband and children of a woman admitted to come to the U.K. to work as the holder of a work permit will presumably not be allowed. It is submitted, however, that this should not be the case.

Seasonal Workers: Provision is made for unskilled seasonal workers who must also have work permits. Their work permits will not be renewed beyond 31 October in any year.³¹⁴ Workers admitted as unskilled seasonal permit holders cannot bring their dependants into the country.³¹⁵

(3) Businessmen:

There are two classes of businessmen i.e. those who come into the country as visitors for the purpose of transacting business (whether that is the primary purpose or whether it was merely incidental to the visit)³¹⁶ and people who come into the country to establish themselves in business.³¹⁷ The first category of businessmen raises no problems as no impediments are placed in

their way.³¹⁸ They may however apply for the consent of the Secretary of State to be allowed to establish themselves in business whether on their own account or as partners in a new or existing business.³¹⁹ Each application is considered on its own merit and at that stage the applicants automatically fall into the second category of businessmen.

People who have obtained entry clearances or have applied to the Secretary of State for a variation of their conditions of stay for the purpose of establishing themselves in the U.K. in business should be admitted for a period not exceeding 12 months with a condition restricting their freedom to take employment. A person without an entry clearance³²⁰ may be admitted for 2 months and advised to present his case to the Home Secretary if he satisfies the conditions relating to businessmen.³²¹

What conditions then must a person satisfy before he can be allowed entry into the U.K. as a businessman? The Rules have given a detailed guide of the conditions i.e.:

"...he will need to show, if joining an established business, that he will be bringing money of his own to put into the business; that he will be able to bear his share of the liabilities; that his share of the profits will be sufficient to support him and his dependants; that he will be actively concerned in the running of the business; and that there is a genuine need for his services and investment. The audited accounts of the business for previous years will require to be produced, in order to establish the precise financial position".³²² "If the applicant wishes to establish a new business ... on his own account he will need to show that he will be bringing into the country sufficient

funds to establish a business that can realistically be expected to support him and dependants without recourse to employment for which a work permit is required".³²³

Some of these conditions will now be looked at in detail in accordance with decided cases. A person wishing to establish himself in business either new or old and whether on his own account or in partnership is required to show that he will "be bringing into the country" sufficient money "of his own" to put into the business. In SAMJI v HOME SECRETARY,³²⁴ it was held by the Tribunal that money paid into a U.K. account of the applicant by his father who was resident in the U.K. does not qualify as assets "brought into the country". In its own words "the method employed, that is, of the father giving his son substantial sums of money (in the U.K.) which were thereafter claimed to the appellant's own assets, does not ... accord with the intention and indeed the specific requirements of the ... Rules". It follows that assets paid into the U.K. account of an applicant by a person resident in the U.K. will not be considered as assets brought into the country. It is submitted, however, that it is within the Rules to pay money into a U.K. account of an applicant if the money comes from outside the U.K.. Thus it is not the residence of the payee in the U.K. that is the criterion but the fact that the money came from outside the U.K..

"Own Assets": The condition that has raised more problems is the requirement that the applicant must bring "assets of his own".

In a case decided under the old laws requiring a person wishing to establish himself in business in the U.K. to devote "assets of his own"³²⁵ to the business it was held by the Tribunal that

"assets of his own" could properly include monies freely given to the applicant by his wife.³²⁶ It was material in this respect that the applicant had an unfettered control of the assets.

It has also been held that a person who refuses to disclose the source of a substantial money in his possession will be refused permission to set up business.³²⁷ The money involved was £5,000 and it was paid into the applicant's U.K. account from outside the U.K.. It is important therefore to note that it is not enough that the money came from outside the U.K.. One must also show the source of that money.

The term "sufficient money" has not been defined but it will of course, vary from case to case. Whatever the case may be, the amount of money to be brought into the U.K. for the purpose of the business must be such that the applicant will not need to supplement the business activities by employment for which a work permit is required.³²⁸ The matter does not simply rest there. Where money is channeled from outside to bolster the business and that money is not at the disposal of the applicant in the sense that he has no fettered control of it and the source is known then he will be refused leave to stay as a businessman because he has not got sufficient money for the business. The money must therefore be enough to set up a business "... which would when established support the proprietor and at the same time enable (him) to make reasonable provisions for holidays and illness and to build up a reserve to meet the vicissitudes of trade".³²⁹ Accordingly assets that are not going to enable a person to establish a business that will yield enough income to meet those conditions is not enough.³³⁰ If the applicant is devoting his own assets to an already established business he

must not only fulfil the above conditions but must also show that the assets he is devoting to the business are proportional to his interest in it. His interest in the business must be such that it yields enough income to enable him to make reasonable provision for his personal maintenance and that of his dependants and to meet the vicissitudes of the business without any outside help.³³¹

Although the conditions above sound, and indeed are, onerous it has been held that a woman with a dressmaking business which earned her £6 - £7 a week and with only £80 to live on would be allowed to stay in the country in business because of, inter alia, the "volume of work available in an apparently lucrative business" and because it was "unlikely that (she) would need to supplement her activities by outside employment".³³² The applicant in this case was in receipt of an allowance from her father but it was not considered serious. This case is to be treated as an exception of the general rules above.

Other Conditions: A person must fulfil and meet all the conditions above ~~and~~ and also comply with the general rules of admission. Thus a person was refused leave to stay in the country as a businessman because he practised deception to the immigration officer in collusion with his brother contrary to the rules.³³³ In the particular case the applicant's conduct was enough to justify his exclusion from the country under the Rules and he did not show enough candour.³³⁴

Evidence of new and subsequent evidence will, in matters relating to stay in the U.K. as a businessman, normally form the basis of a new application.³³⁵ In other words unless there are

exceptional reasons evidence of new things e.g. improved financial state etc., will form the basis of a new application and accordingly the best thing is to apply straight away for leave to enter on that new basis.

A person coming to join an established business in the U.K. as a partner or director will be refused entry into the country if his proposed partnership or directorship amounts to disguised employment.³³⁶ This provision has come up for interpretation in a number of cases. In P. SINGH v HOME SECRETARY,³³⁷ the appellant applied to be allowed to stay in the U.K. in a business owing to his experience and investment in the business. He was a director and secretary of the company on a salary and had loaned money to the company. He held 15 £1 shares out of the company's capital of £100. He, however, received no interest on his loan nor dividend on his shareholding. Moreover there was no agreement in writing as to his future in the company and he could be removed from the board and from his secretarial duties at any time by the majority shareholders. It was held by the Tribunal that in the absence of any evidence as to the continuity of his position in the company and as he did not receive any share of the profits, the appellant was in reality no more than a paid employee of the company and would need an employment permit to work.

It appears that where partnership is claimed there must be articles of partnership regulating the future of the partners and what they are entitled to. What is not clear from this is whether the Tribunal can go behind a formally executed document setting out all the matters required to be set out in it. It is possible that they will do so in order to ensure actual

compliance with the law but in doing so they will be treading on the person's civil rights.

The Tribunal has been ready therefore to allow a person to stay in the country as a businessman where it was shown that he had been associated with the business for many years and that he owned 2,100 shares out of the capital of the business of 15,000 shares, that that financial year he had been voted £1,500 in emoluments as a director and that he owned a 25% share of a property which was worth £15,000. In the circumstances it was held that this was not a disguised employment but a partnership and it was apparent that there was a need for his investment and services.³³⁸

In another case it was held that a dressmaker with little income and money to start her business would be allowed to stay in the country to do business because it was demonstrated that her business was a lucrative proposition and that she was competent and resourceful.³³⁹ To be admitted to go into business one must be a partner or director in the true sense of the word therefore.

Businessmen from non-Commonwealth countries allowed to remain for more than 6 months are required to register with the police.³⁴⁰ They are however allowed to bring in their wives and children under the age of 18 but since the husbands as businessmen will be prohibited to take employment it might follow that their wives and children will also be prohibited from taking employment.³⁴¹ A person admitted as a visitor who applies for a variation of his leave to stay as a businessman and has satisfied the Secretary of State that he qualifies as such under the rules above will be granted an extension of stay of up to 12 months; where the person was admitted initially as a businessman he will also

be granted an appropriate extension of stay if he still qualifies as a businessman under the Rules.³⁴²

(4) People of Independent Means:

A person of independent means is one who satisfies the immigration authorities that he can live in the U.K. indefinitely without working.³⁴³ According to the Rules a person may show that he is of independent means by producing bank statements, or a statement of pension entitlement or other evidence that he has means of support under his own control and disposable in the U.K. and which are adequate not merely for a year or two but for the foreseeable future.³⁴⁴ Such a person who also produces an entry clearance granted for that purpose will be admitted into the U.K. for an initial period of 12 months but in other cases he will be admitted for 2 months initially and advised to make further application to the Home Office.³⁴⁵

The most important issue that arises in the above case is what "independent means" means. There are a few cases that demonstrate what the authorities take into account in deciding whether a person is or is not of independent means. In RANDHAWA v HOME SECRETARY,³⁴⁶ the appellant aged 63 had a pension of £10 a month and two small farms in India from which he got some income. He was staying with his children who provided him with free board and lodging both of which he sought to be considered. The Tribunal found that the appellant's income in the U.K. was inadequate on its own to support him and he could only manage financially by being able to live free of expense with his children. In the circumstances it was of the view that the person was not independent in means and particularly as

"... his income cannot be taken in conjunction with his partial dependence on his family in order to establish him as a person of independent means". Although this case was decided under the now repealed laws, it is still good law as the present rules are the same. Accordingly a person cannot under the rules claim the benefits he is receiving from his friends or relatives as part of his income when assessing whether he is a person of independent means. In a later case of HOME SECRETARY v RAVAL,³⁴⁷ the Tribunal following the case of Randhawa above refused to take into account the benefit of nearly free board and lodging offered to an elderly couple, 62 and 59 years old, by their son. However the Tribunal found that the couple "did not smoke or drink alcohol and (were) vegetarians". They were "in receipt of a pension and allowances" which was assured and guaranteed and their weekly income was £20. It was held that although the "income of £20 will leave little over after all expenses have been met, ... the respondent and his wife will be able to manage, leading a frugal life as has been their wont, even if they have to pay for their own board and lodging". Their leave to stay was thus extended for 12 months. This case is a good illustration of the appellate authorities' attitudes. As long as one can show an assured income that is disposable in the U.K. for his use and it can be shown, purely arithmetically, that he can live on it, if only barely, then one may be allowed to stay in U.K. as a person of independent means. The demand is hardly onerous.

In another case an applicant had £9,000 in an Australian bank which would have earned him an income of £1,500 p.a. in interest and it was all disposable to him in the U.K. on request.³⁴⁸

It was held that he had adequate means, not merely for one year or two but for the foreseeable future.

The word "independent means" is therefore used in such a fashion as not to allow a person to remain in the U.K. largely on the basis of moneys or benefits in kind given to him as income whether from outside or inside the U.K.³⁴⁹

Wives and children under 18 years of people allowed to remain in the U.K. on the basis that they have independent means will be allowed into the country but there will be a prohibition on their taking employment since their husbands are not allowed to take employment.³⁵⁰ Both the applicants and their dependants will be given an extension of leave to remain provided at that time they satisfy the Home Office that they are people of independent means still.³⁵¹ People of independent means allowed to remain in the country for more than 6 months must register with the police if they are visa nationals.³⁵²

(5) Self-Employed People:

Self-employed people with entry clearances are admitted initially for 12 months if an immigration officer is satisfied that they will be able to support themselves and their dependants without recourse to public funds. They will be prohibited from taking employment. If they have not so satisfied the immigration officer then they may be allowed into the country for 2 months initially and advised to make further application to the Home Office.³⁵³ The problem that has to be resolved is what a "self-employed person" is. The rules have given an artist and a writer as examples of a self-employed person.³⁵⁴ In one case a person applied for a

variation of his conditions to stay in the U.K. to fulfil a long-term recording contract which involved public appearance with supporting English musicians.³⁵⁵ He was himself a musician.

He claimed that for the above reasons he would as an artist satisfy the provisions relating to self-employment. The Tribunal refused his submission and said he was an entertainer not a self-employed person. It was of the opinion that the word "artist" in the rules meant a person like a painter or sculptor rather than a singer. In another case³⁵⁶ an applicant sought an extension of stay as "self-employed". He was proposing to work on a commission basis selling and advertising space in a named commercial directory and helping to promote sales of the directory and also selling on a free-lance basis for a mail marketing consultancy business. The Tribunal held that the evidence showed that he was to be engaged under a contract of service by the two companies and was not following an occupation remotely resembling those of the instances given by the rules.

These two cases clearly demonstrate that the categories of self-employed people are limited by the very strict interpretation of the word "self-employed".

Wives and children under the age of 18 of self-employed people should be admitted into the country for the appropriate time and a restriction on employment imposed on them.³⁵⁷ Obviously, an applicant must show that he can be able to support himself and his dependents before they are admitted. They will be granted extensions of stay in the U.K. if they show that they are self-employed still and that they will continue to be able to support their dependants.³⁵⁸ Non-Commonwealth self-employed

people if admitted for more than 6 months are required to register with the police.³⁵⁹

All people allowed into the U.K. to take or seek employment, or as businessmen, or as people of independent means or as self-employed ~~people~~ are not allowed to bring any other dependants other than their wives and children under 18 years until and unless the time limit on their stay in the U.K. has been removed i.e., until they have been in the U.K. for 4 years and have been admitted for settlement.³⁶⁰

(v) People Coming for Settlement

People falling under this head are U.K. passport holders, dependants of the U.K. nationals or/and settled residents, (i.e. wives, children, parents and grandparents, distressed relatives, husbands and those coming for marriage) and returning residents.

(1) U.K. Passport holders:

Where a non-patrial passenger is a holder of a passport of the United Kingdom and Colonies and he presents a special voucher issued to him by a British Government representative overseas (or an entry clearance in lieu) he is to be admitted for settlement. If he comes without the special voucher or entry clearance granted for the purpose of settlement he is to be refused entry.³⁶¹

It must be noted forthwith that the method of issue of special vouchers is outside the scope of the immigration appellate authorities³⁶² ^{that they} and cannot, more over, be obtained in the U.K..³⁶³

In the circumstances it is often advisable to apply for an entry clearance for the purpose of settlement because if it is refused one has under the Immigration Act 1971, a right of appeal and, an entry clearance can be granted in the United

Kingdom. In a good case there is no reason why the appellate authorities can refuse to admit a person for settlement in an appeal arising from such a refusal. The effect of this may well be to circumvent the discretionary method of issuing vouchers for settlement but the Rules and the Immigration Act anticipate this by providing that one may apply for an entry clearance in lieu of a voucher for settlement. A refusal of an entry clearance automatically gives rise to an appeal.

The issue of a voucher or entry clearance for settlement does not depend on the sex of the applicant so long as one holds a passport of the U.K. and Colonies and is a British subject. There are cases, however, where the issue of such a voucher or entry clearance will depend on the marital status of a woman. Thus, widowed women who cannot produce certificates of marriage or "divorcees" who divorced without going through the courts, or deserted women who cannot produce paper evidence of their situation will most certainly find themselves in the predicament whereby they hold British passports but cannot qualify for the grant of a voucher or entry certificates.³⁶⁴

Under the Rule above it is deliberately required of the U.K. and Colonies passport holders to be in possession of the passports³⁶⁵ but unlike the old immigration laws, entry or leave to enter is not dependent on whether or not the passport was issued on behalf of the U.K. Government in a part of the Commonwealth or by a U.K. Colonial Representative.³⁶⁶ The criterion now is whether or not such a person is a citizen of the U.K. and Colonies (or a British subject not possessing that citizenship or the citizenship of any other Commonwealth country or territory) who holds a U.K. passport

issued in the U.K. and Islands or the Republic of Ireland. In that case he will be admitted freely without proof of patriality unless the passport is endorsed to show that he is subject to immigration control.³⁶⁷ In addition citizens of the U.K. and Colonies who hold U.K. passports wherever issued and satisfy the immigration officer that they have been previously admitted for settlement are re-admitted freely.³⁶⁸ If this were not so any person once accepted for settlement would forthwith lose his right of exit for no reason and this would be tantamount to a restriction of his freedom of movement.

A non-patrial citizen of the U.K. and Colonies or a British subject not holding such citizenship nor that of any other Commonwealth country is subject to an intractable problem if he does not in fact possess a U.K. passport already. It has been held, and it is indeed a rule of great antiquity, that the power to grant or withhold passports in the U.K. is one of Her Majesty's Royal Prerogatives and that the Foreign Secretary has a discretion to accede to or refuse an application for such a passport.³⁶⁹ The prerogative may be exercised by a British representative overseas or by a Governor of a Colony of the U.K. or dependent territories and in these cases, like that of the Foreign Secretary, the power to grant or refuse a passport is absolutely discretionary. That being so a person who is a citizen of the U.K. and Colonies or a British subject with no such or other Commonwealth citizenship applying initially for a passport (either in the U.K. or abroad) for the purpose of settlement is placed in a predicament without a legal remedy. If he is refused the passport he has no remedy and without such a passport he cannot be issued with the voucher or entry

clearance for the purpose of settlement under this head.

Moreover, those people whose U.K. passports were not issued in the U.K. could still be refused the voucher for settlement and, as has been noted, there is no remedy against this either.

These are burdensome hurdles and it is sometimes easier for a person without such British connections to settle in the U.K. than them in spite of the fact that the U.K. Government has certain obligations towards them.

A citizen of the U.K. and Colonies holding a British passport who presents a special voucher (or entry clearance in lieu thereof) for the purpose of settlement will be admitted for settlement. If he has an entry clearance for that purpose which has been obtained by concealment or false misrepresentations of material facts then he will be refused entry into the U.K.³⁷⁰ Presumably this applies in respect of special vouchers too. However, whereas an appeal lies to the appellate authorities from a refusal of entry on grounds of concealment and misrepresentations of material facts if the person was holding an entry clearance, it is not clear if such an appeal lies in the case where such concealment and misrepresentations of material facts were employed to obtain a special voucher. Since the Tribunal has held that the method of issuing special vouchers lies outside the appellate authorities jurisdiction, it would seem that the appellate authorities will have no jurisdiction to entertain an appeal arising from a refusal of entry on grounds that misrepresentation and concealment of material facts were employed to obtain a special voucher.

(2) Dependants of People Settled in the U.K.:

This section deals with dependants of a person who is already in the U.K. and settled there, or who is on the same occasion given indefinite leave to enter.³⁷¹ Except for the wife and children under 18 of a Commonwealth citizen who is a patrial or was settled in the U.K. before the coming into force of the Immigration Act 1971, the admission of all dependants will depend on the ability and willingness of the settled person to support and accommodate his dependants without recourse to public funds.³⁷²

It is a condition that a person coming into the U.K. for the purpose of settlement as a dependant must be in possession of a current entry clearance granted for that purpose.³⁷³

(a) Wives: The Rules provide that the wife of a person who is settled in the U.K. or is on the same occasion being admitted for settlement is to be admitted if the person can support and accommodate her without recourse to public funds and if she has a current entry clearance for settlement. A member of H.M. Forces based in the U.K. but serving overseas is to be regarded as being in the U.K..³⁷⁴ However, a woman who has been living in permanent association with such a man has no claim to enter, but may be admitted as if she were his wife, due account being taken of any local custom or tradition tending to establish the permanence of the association.³⁷⁵

How does a woman prove that she is the wife of a settled person in the U.K.? There have been problems in this area. In the first place the standard of proof of a marriage required is on a balance of probabilities. In *R. v HOME SECRETARY ex*

parte S.B. HUSSAIN, Widgery, L.C. Justice remarked that "I can see no possible reason requiring a higher standard of proof It would be quite unreasonable to assume that (the immigration rules) contemplate proof beyond dispute or even beyond reasonable doubt".³⁷⁶

In spite of this dictum it is widely known that entries are refused to wives on the ground that there were discrepancies between the husband who may have been in the U.K. for years and the wife. Discrepancies such as the number of trees or houses on the family land, the places, dates of birth of children, ages and residences of other relatives etc. will normally lead to a refusal of entry of the wife into the U.K.. Where the applicant fails to produce documents such as a marriage certificate she will be refused entry almost automatically.³⁷⁷ The problem of the wives is all the ^{more} worse because until recently documentation of such things as marriages, deaths and births was not there or if it was there it was not compulsory.

Domicile: A woman who has managed to prove that she is married to a person admitted to the U.K. for settlement will not ipso facto be admitted into the U.K.. Their marriage must be in accordance with the English law if the husband's domicile is the U.K. in spite of a provision for the local customs and traditions to be taken into account. Reported cases reveal a very restrictive interpretation of "marriage" in relation to wives whose husbands are settled and domiciled in the U.K.. A woman will not be allowed to come into the U.K. if her marriage to her husband is the second or the third one to the man and the marriage takes place after the man is admitted for settlement in the U.K..³⁷⁸ Thus in A. MUSSARAT v HOME SECRETARY,³⁷⁹ the sponsor was resident in

the U.K. since 1963. In 1970 while on a visit to his wife and children in Pakistan he married his second wife under Pakistan law. He subsequently applied for an entry certificate to enable her to accompany him to the U.K.. The entry certificate officer refused her an entry certificate on the ground that during her marriage the husband had abandoned his Pakistan domicile and acquired a domicile of choice in the U.K.. The decision was reversed on appeal because the Tribunal was not satisfied that there was sufficient evidence to establish a change of domicile. This case is important because it establishes the fact that even if a marriage is not valid according to the U.K. laws or for the purpose of the U.K. immigration law, it will nevertheless be recognised as valid if the man has not abandoned his former domicile for that of the U.K. notwithstanding that he is settled in or is a citizen of the U.K.. Thus in one case³⁸⁰ a woman was refused an entry clearance to join her U.K. settled husband because she was married to the man under the Nigerian customary or native law; the marriage was potentially polygamous and accordingly unacceptable as a marriage for the purpose of immigration law. It was found^{as} a fact that the man had not abandoned his Nigerian domicile or for that matter taken the English domicile and on that finding the wife was admitted to join the husband.

^{case}
In another/there was a proxy marriage which was irregular in form and would not have been recognized as a marriage under immigration law. The man had not abandoned his Pakistan domicile for that of the U.K. and because of that the proxy marriage was held valid.³⁸¹

There is one exception to the holdings above. A woman who

has been living in permanent association with a man settled in the U.K. may be treated as his wife even if the woman is not actually married to him or if she is invalidly married to him.³⁸²

The Tribunal has held that the exception is apposite to cover not only single persons cohabiting as man and wife but also in cases where one or other of the parties may already be married and therefore unable to contract with the other party.³⁸³

In this case the question of domicile did not arise and was never referred to. It, however, applies to wives of people who are settled and domiciled in the U.K. since the irregularities of a marriage do not, from the other cases, seem to form a ground for refusal of leave to enter for a wife whose husband's domicile is not the U.K..

The introduction of domicile into immigration law has certainly complicated things. In the first place it is a loophole in the policy package, if there is such a policy, of excluding wives whose husbands are settled in the U.K. but whose marriages do not conform to the law of the United Kingdom. Thus assuming the U.K. prohibits polygamy on the part of people coming to settle in the U.K., then to have introduced domicile into the law meant that the policy is defeated since people whose domicile is not the U.K. fall outside the exclusion list.

In the second place, the introduction of the term domicile is being used to strike down people's personal laws of various immigrant communities in the U.K.. This is something that only an Act of Parliament should do. In relation to this the fact that a polygamous marriage, for example, is not recognizable for the purpose of immigration law amounts to a down-grading of the immigrant communities' cultural values and it is indeed

questionable whether immigration law is the proper instrument for this. To prohibit a Mohammedan man settled in U.K. from marrying more than one wife and at the same time allow them to follow the teachings of the Koran without a specific statutory authorisation seems to be blatant disregard of other people's cherished "freedoms". Is it possible that the Home Office is administering a policy which it would not be^{able} to enact into law?

Accommodation: One of the most serious limitations upon the right of a settled man to bring his wife to the U.K. is that he must be able and willing to support and accommodate her without recourse to public funds. In an unreported case³⁸⁴ the wife and her children obtained entry clearance certificates for the purpose of settlement. On arrival in the U.K. it transpired that the husband was serving 30 months imprisonment for robbery. Although the family was allowed entry on the technical ground that they were the family of a Commonwealth citizen who settled in the U.K. before the Immigration Act 1971 came into force, it was made abundantly clear by the Tribunal that no person who was going to be a charge on public funds would be allowed into the country. The case also illustrates the difference between being able and being willing to support dependants. Both conditions must be satisfied before entry is granted.

It has been submitted³⁸⁵ that if the husband is unable to show that he is lawfully settled in the U.K. then his wife will not be allowed to come into the U.K. for settlement.³⁸⁶ In another case it was held that the wife of a returning resident was refused entry because the husband was, at the time of her arrival, in Bangladesh.³⁸⁷ The Tribunal was heavily influenced

by the fact that there was no evidence that the husband would be returning to the U.K. and the mere fact that a person may be entitled, as of a right to return to the U.K. is not sufficient evidence that he will come back.

(b) Children: Children under the age of 18 who have entry clearances for settlement and whose parents are willing and able to support them without recourse to public funds are to be admitted for settlement:

- (a) if both parents are settled in the United Kingdom, or
- (b) if both parents are on the same occasion being admitted for settlement; or
- (c) if one parent is settled in the U.K. and the other is on the same occasion admitted for settlement; or
- (d) if one parent is dead and the other parent is settled in the U.K. or is on the same occasion admitted for settlement; or
- (e) if one parent is settled in the U.K. or is on the same occasion admitted for settlement and has had the sole responsibility for the child's upbringing; or
- (f) if the Secretary of State has authorised the admission of the child with or to join one parent or a relative other than a parent because family or other considerations make exclusion undesirable - for example, where the other parent is physically or mentally incapable of looking after the child - and suitable arrangements have been made for the child's care.

"Parent" includes the stepfather of a child whose father is dead; the stepmother of a child whose mother is dead; and the father as well as the mother of an illegitimate child. It also includes

an adoptive parent, but only where there has been a genuine transfer of parental responsibility on the ground of the original parent's inability to care for the child, and the adoption is not one of convenience arranged to facilitate the child's admission.³⁸⁸

Parents who were settled in the U.K. before the coming into the force of the 1971 Immigration Act and who are from a Commonwealth country need not show that they are willing and able to support their children without recourse to public funds.³⁸⁹ Moreover an unmarried and fully dependent son under 21 or an unmarried daughter under 21 who formed part of the family overseas (whether Commonwealth or foreign) may be admitted if the whole family is settled in the U.K. or is being admitted for settlement; otherwise children over the age of 18 must qualify for admission in their own right.³⁹⁰

Discrepancies involving age will in some cases lead to a refusal of entry of a child into the U.K. for settlement. The problem of determining a child's age in countries with no birth records and given the immigration authorities substantial scepticism is still unresolved. At one stage it was thought that bone x-rays were a sure proof of age³⁹¹ but recently this was rejected as a method of establishing the age of a child because it is unlikely to be useful or true in cases of children from poverty stricken areas e.g. Bangladesh, and particularly when a child is of a poor build and nutrition.³⁹² The age of the child is of primary importance in establishing that the person settled in the U.K. is the father and also for establishing that the child is within the accepted age of admission of 18 years.

Once it is accepted, rightly or wrongly, that a child is

under the age of 18 and that he will be supported in the U.K. then the immigration authorities have to be satisfied that the parent(s) is/are settled in the United Kingdom under one of the several heads listed above i.e.,

(a) If the parents are settled in the U.K.. In a case³⁹³ decided under the old laws which were in para materia with the present Rule, the appellant applied for an entry certificate to enable him to join his natural mother. His father and mother were separated when he was one week old on his father leaving Jamaica for the U.K. and since January 1956 neither the appellant nor his mother had any further contact with his father. The appellant's mother subsequently came to the U.K. where she settled. His application for an entry certificate was refused on the ground, inter alia, that the intention of the provision "... if both parents are settled in the U.K." was to enable children coming to the U.K. for settlement to be united with both parents. Although the applicant was eventually admitted into the U.K. by the Home Office on his father being found settled in the U.K. it is still the law that an applicant wishing to come to the U.K. for settlement as a child under the age of 18 must satisfy the immigration authorities that both parents are settled in the U.K.. This is a very strict and narrow interpretation of the provision and it is bound to cause a lot of hardship.

Perhaps it ought to be clarified at this stage that even the word parent is restrictively applied. It was ruled in one case that it does not include the mother who has remarried a U.K. resident who is not the child's natural father, both of whom are settled in the United Kingdom.³⁹⁴ This is an odd pronouncement. On the face of it it would seem to obliterate the word step-father altogether. However, it is applicable to polygamous

marriages. In a later case³⁹⁵ decided without reference to that above, it was held that two children of a first marriage of a certain lady became the step-children of a man of her second marriage because their natural father had, like in the other case above, abandoned them and because of the frequent occurrence and general acceptance of common law marriages in Trinidad. Accordingly the woman's second man in marriage was a step-father of the children. In the first case the second marriage of the parties took place in the U.K. whereas in the second case the second marriage took place in Jamaica. It might be inferred from the cases following the reasoning above that since there is no frequent occurrence and general acceptance of common law marriages, i.e. de facto marriages in the U.K., the appellate authorities will be more willing to recognise a "step-father" relationship in cases where a marriage took place in another country where such marriages are accepted and will probably refuse to recognise such a relationship if the "marriage" took place in the U.K.. Distinctions of these kind make the law so complicated apart from the fact that there is an air of unreality in them.

(b) If both parents are on the same occasion being admitted for settlement: "On the same occasion" is used in relation to time and accordingly a child under 18 who does not accompany his/her parents when they are being admitted for settlement in the U.K. will be, in general, refused entry if he/she applies for an entry later for the purpose of settlement in the U.K.. The Home Office and appellate authorities have, however, recognised that there are cases where a child may be left behind when the parents are being admitted for settlement. Obviously each case

will be considered on its own merits but the following reasons are normally accepted, that is: when children stay behind to complete their education or are staying at a boarding school or where there were no sufficient financial means for bringing them to the U.K..³⁹⁶

Under the old law there was no limit on the length of time for which a family could remain separated before it could be re-united by effluxion of time.³⁹⁷

This is no longer the case for it must be noted that the Rules place an upper limit of 21 years for an unmarried and fully dependent son and 21 years for an unmarried daughter.³⁹⁸ Therefore a child who does not come with the family for settlement for any sufficient and satisfactory reason or reasons has until the age of 21 at the most to apply to come for settlement with the family.

(c) Children who are under 18 years: They are to be admitted for settlement if one parent is settled in the U.K. and the other is on the same occasion admitted for settlement or

(d) if one parent is dead and the other parent is settled in the U.K. or is on the same occasion admitted for settlement. In general no problems arise in the above provisions as long as the family moves to the U.K. in one unit or, if that is not possible, there are cogent reasons for leaving any member of the family behind.

(e) Many problems have arisen in respect of the provision that a child under 18 years is to be admitted for settlement if one parent is settled in the U.K. or is on the same occasion admitted for settlement and has had the sole responsibility for the child's upbringing. It is the phrase "... sole responsibility for the child's upbringing" that has caused many problems. In general the phrase has been said to mean not simply the legal

responsibility. It embodies the attitude of thoughtfulness and care (for the child) ... throughout its life".³⁹⁹ In short there must be legal and moral responsibility epitomised by such demonstrations as showing that the sponsor "... had sole responsibility as against anyone else in loco parentis".⁴⁰⁰ In a classic definition the Tribunal held that "... the words 'sole responsibility' cannot reasonably be construed in their most liberal terms to mean absolute responsibility of the parent in the U.K. for the upbringing of the child ... because some form of responsibility must nearly in all cases be exercised in practical matters by the relative with whom the child is living outside the U.K.. The issue of sole responsibility for the upbringing is not to be, moreover, decided only as between one parent and the other parent. The decision in every case will involve consideration inter alia of the sources and degree of financial support for the child, and whether there is cogent evidence of genuine interest in and affection for the child by the supporting parent in the U.K.". ⁴⁰¹

It follows from the above dicta that each case will be considered on its own merits having regard to all the practical realities of the situation before "sole responsibility" is acknowledged. A general look at the cases reveals that where there has been substantial, if not entire, financial support from the parent in the U.K. and continuous concern for the child's welfare and a desire for re-union the child will be admitted for settlement under this clause.⁴⁰² If the responsibility is shared between the parents one of whom does not live in the U.K., then the child will not qualify under this head.⁴⁰³

In an interesting case a mother of 3 children married in Guyana had her marriage dissolved in the U.K. where she was settled. The

High Court of England gave her the custody of the children although, in fact, the father had, from 1962 when the mother left Guyana for the U.K. until 1972, supported the children continuously. In 1972 the mother applied for entry certificates to enable the 3 children to join her for settlement in the U.K.. It was argued on appeal that, inter alia, it was not within the power of the adjudicator to render the Divorce Court's order a nullity by refusing the children entry certificates to enter the U.K. for settlement. The Tribunal, to which a further appeal was made, ruled that the adjudicator, and immigration authorities accordingly, had power to interfere with the custody order of the High Court. As the sponsor had not satisfied the authorities that she had the sole responsibility of the children (and she did not of course have it) the entry certificate's decision refusing such certificates was in accordance with the law and the immigration rules applicable. Accordingly a court custody order could not be permitted to nullify the relevant provisions of immigration law and the Rules made thereunder.⁴⁰⁴

That decision can be criticised for its rigid application of the immigration rules to the exclusion of the interests of the children. Normally courts make custody orders where it is in the interest of the children, morally and economically, to be with one or other of the parents. To refuse the admission of such children merely on a technicality of law, goes against the court's considered views and makes immigration law oppressive and is wholly inconsistent with the doctrine of judicial precedent. Some parallel could be drawn here with the fact that courts have no power to order the deportation of a person from the U.K. but it must be remembered that there is a specific provision specifying that the courts can only recommend the deportation of a person. To hold, therefore,

in the absence of a specific provision, that a court's custody order of children is not binding on immigration authorities is not only to ignore a judicial order but it also effectively deprives the courts of the power of enforcement of such an order.

(f) A child under the age of 18 years will be admitted into the U.K. for settlement notwithstanding that he has not satisfied any of the above conditions if the Secretary of State has authorised the admission of the child to join one parent or a relative other than a parent because family or other considerations makes exclusion undesirable. It was held very early that "... in deciding in any particular case if family or other considerations make exclusion of an (applicant) undesirable ... such considerations must be applied to the country in which the (applicant) lives and not those pertaining in the United Kingdom".⁴⁰⁵ Such conditions may be, for example, the accommodation available at the present home, the age and health of the relative in charge of the child, ill-will in the present home,⁴⁰⁶ etc..

The only time that the conditions for the child in the U.K. will be considered is when it has been shown that conditions obtaining abroad show that the exclusion is undesirable.⁴⁰⁷ A comparison of this kind and at this belated time is more of an hindrance than a help because the approach of immigration authorities and appellate authorities will invariably be that if conditions abroad are better than those in the U.K. then the child will be refused entry. If there is to be consistency with the general interpretations adopted here then once it is established that the conditions abroad make a child's exclusion undesirable the child should be admitted without further reference or comparison with the U.K. conditions. In other words the expression that "family or other considerations make

exclusion undesirable" should be applied in relation to conditions abroad only.

There is an element of irrelevant considerations by the appellate authorities when considering cases under the above head. In at least two cases the Tribunal when giving reasons for refusing entry certificates to applicants has said that the applicants had at the time of application for entry reached an age when they might be a help to their ailing relatives e.g. grandmother, grandfather or father.⁴⁰⁸ Unless this is a total reversal of the specific provisions of the Rules it cannot by any stretch of imagination be argued that such a reason forms a family or other consideration which makes exclusion undesirable. In one case, however, the entry certificate officer refused entry to an applicant because, in relation to other people in Jamaica, the applicant was better off than others.⁴⁰⁹ The Tribunal reviewed the decision and in allowing entry to the applicant ruled that "... the fact that there were worse conditions elsewhere in Jamaica is not relevant, since bad conditions are not made better by the existence of even worse conditions".⁴¹⁰ This seems a good finding.

The conditions making exclusions from the U.K. undesirable must be in existence at the time the application for entry is made and it is not sufficient, for this reason, to state that they are imminent.⁴¹¹ This attitude is necessarily harmful in that a child will not be admitted into the U.K. for settlement under this head unless it is demonstrated that the conditions making exclusion undesirable actually exist. Surely if it can be shown that the conditions are imminent and will cause damage, be it irreparable or not, a child should be admitted for settlement immediately.

Parent: The term "parent" is not defined in the Rules but only examples of what relatives may be called parents are given. In the circumstances it is necessary to look at decided cases to see how the appellate authorities have approached the issue. It has already been noted above that the term "parent" does not include a stepmother or a stepfather where the mother has married a U.K. resident who is not the child's natural father.⁴¹² In that case the natural father was still alive. In a later case the Tribunal categorically stated that where there is a reference to "both parents", in the provisions set out above, the word "step-parent" cannot be taken into account when a child's natural parents are both living.⁴¹³ In other words the word "parent" does not include a step-father or a stepmother where the child's natural parents are both living. The effect of this dictum is that where a child's natural parents are not living together as man and wife, de facto or de jure, the child will not qualify to come for settlement to the U.K. unless both natural parents are settled in the U.K. whether as a family (man and wife) or not.⁴¹⁴ However, for reasons already given above it appears that this provision applies to cases where ^{not} the second marriages have/taken place in the U.K. and accordingly step-parents are recognised notwithstanding that both parents are still living if the second marriage took place outside the U.K. and particularly if the so called "Common Law Marriages" are practised and accepted there.

How about "adoptive parents"? It is a well established law that the immigration authorities and appellate authorities will not recognise an "adoptive parent" as such if in fact under the law of his former country or under his personal law, on the basis of which the adoption is claimed, does not recognise ^{the} adoption. Thus it was held that the immigration officer acted according to the

Immigration Law and Rules when refusing an entry certificate to an applicant who claimed that he was adopted by^a/sponsor (the sponsor claimed the adoption also) because adoption is not recognised under Mohammedan Law.⁴¹⁵ In such cases the only way out is to get an adoption order of a competent court; a mere attestation by a magistrate or judge that a relative or a person is an adoptive parent will not and does not suffice.⁴¹⁶ The appellate authorities are prepared to recognise a de facto adoption if there is no mandatory law to the contrary. Thus in a recent case,⁴¹⁷ the Tribunal held where a child was handed over to another person when he was young (about 20 years previously) that the lack of legal adoption formalities could not, in the context of the West Indies, be held to preclude a de facto adoption. It must be noted that the Tribunal was heavily influenced by the fact that the child had been brought up and depended entirely on the person to whom he was given and that he had in fact never depended on the natural parents who had no part in his upbringing. A de facto adoption cannot, ipso facto, entitle an applicant to entry for settlement if other conditions cannot be proved. Thus in one case a de facto adoption by a Hindu man was recognised by the appellate authorities, but since he could not show that he had had the sole responsibility in the upbringing of the child the child could not be admitted into the U.K. for settlement.⁴¹⁸

A legal adoption, no matter how perfect, will not suffice for the admission of a child into the U.K. for settlement if it was concocted for the purpose of facilitating such an admission.⁴¹⁹ There has got to be a genuine desire to adopt a child as one's own and without this desire, to effect an adoption merely for the purpose of facilitating admission amounts to an abuse of the judicial process,

it is submitted. The problem lies in distinguishing cases of a desire to take a child as one's own and "bogus adoptions" when an adoption has been made to facilitate the entry of an adoptive child.

In the case of MERCHANT AND OTHERS v ENTRY CLEARANCE OFFICER, BOMBAY,⁴²⁰ a Hindu de facto adoption was held invalid for the purposes of immigration law because it was contrary to the mandatory procedure for adoption under the Hindu Adoptions and Maintenance Act 1956,⁴²¹ of India. It was argued that the doctrine of 'factum valet' which means "what ought not to be done is valid when done" applied but the Tribunal following certain authorities⁴²² ruled that the doctrine of "factum valet" was ineffectual in the case of an adoption in contravention of mandatory provisions.

Finally, it is submitted that a brother is a parent in certain cases for the purpose of the definition of the term "parent". In one case⁴²³ the appellate authorities accepted the importance of the custom and tradition in India, as in many other countries, whereby it would be the expectation within an Asian family that on the death of the father the eldest son should assume responsibility for his brothers and sisters. Where it is proved that responsibility is assumed by a brother or a sister then in a proper case they should be treated as parents.

Children over 18 Years: It was noted at the beginning of this topic on children that children aged 18 years or over must qualify for admission on their own right subject to the concession that an unmarried and fully dependent son under 21 or an unmarried daughter under 21 who formed part of the family unit overseas may be admitted if the whole family is settled in the country or are being admitted for settlement. It must be stated straight away that one may cease to be a member of the family overseas before the upper age limit

of 21 years if "... circumstances, such as marriage and thus the formation of a new family unit, or leaving home to work elsewhere, show that the person has separated from the original family unit".⁴²⁴

The absurdity of this holding is that a person may cease to be a member of the family unit merely by marriage when it is a custom or tradition that such a marriage is a further extension of the family unit wherever it is. This would certainly be the case in an extended family system. To assume, therefore, as the Tribunal held, that a marriage creates another family unit is not only a plain lack of appreciation of the local circumstances but an imposition of a new concept of family on the immigrants. Whether that is desirable or not is a difficult question to answer but there is hardly any doubt that the official approach, and perhaps policy, is to stick to the British concept of a family in immigration matters.

There is nothing in the above case to suggest that that policy applies to children under the age of 18. Such children have an unqualified right of entry and they should be so admitted whether they are married or unmarried and whether or not they are dependent on their parents who are settled or are being admitted for settlement in the U.K.

A child who remains behind, for any cogent reason, when the rest of the family has emigrated to the U.K. and at the time of application he is over 18 years will be granted entry. A cogent reason may be remaining behind to complete a degree course.⁴²⁵

In this case he will be admitted as a member of the family unit overseas and not in his own right. In BERNARD v ENTRY CLEARANCE OFFICER, KINGSTON,⁴²⁶ the appellant, an unmarried girl aged 19 years from Jamaica applied for an entry clearance to be able to join the

rest of her family which was settled in the U.K.. The girl had a 2 year old child and it was said that the appellant received some financial support from the child's father. She also received financial aid from her parents but not as much as from her child's father. In 1973 the appellant's 5 siblings, all under 18 years, had joined her parents then settled in the U.K. but she remained behind. She said that if she was admitted she would leave her child with her paternal grandmother for care.

After the evidence above the Tribunal was asked to rule on whether she should be admitted into the U.K. for settlement as an unmarried daughter under 21 who formed part of the family unit overseas, the whole family then being settled in the U.K. or being admitted for settlement. The Tribunal held that the facts did not disclose any cogent reason why the appellant's parents had not attempted to re-group the family sooner; and as the evidence showed that at the date of application the appellant maintained a fairly close association with the father of the 2 year old child, it appeared that she had already formed or was in the process of forming her own family unit. Her application was properly refused. The Tribunal was influenced by the existence of customary law marriages in Jamaica although the case as a whole gives the impression that it came to that conclusion too readily. The important revelation of the case is that although the Tribunal cannot look at dependency on the parents settled or being admitted for settlement in the U.K. in the case of an unmarried girl, it is absolutely free to look at all the other circumstances at the home of a girl abroad and the behaviour of the parents, particularly in failing to bring the girl for settlement with the other children.

For a son above the age of 18 years but below the age of 21

years to be admissible for settlement under the above clause he must show that he is unmarried and completely dependent on the sponsoring parent. Thus where a son was partly dependent on a father in the home country and partly on a sponsoring mother settled in the U.K. and divorced from her husband, it was held by the Tribunal that there was no complete dependency on the mother and accordingly the son was not a member of the family unit still remaining in an overseas country.⁴²⁷ The fact that the son was the last remaining member overseas of the family unit of whom his mother in the U.K. was the head did not avail him. Dependency must therefore be full and complete and in some cases what that means will depend on what the appellate authorities understand it to mean. The policy considerations of subjecting a boy under 21 years to prove that he is fully dependent on the sponsors while leaving a girl under the age of 21 years free from such proof are not clear but they (policy considerations) may probably be related to the fact that girls, particularly from the Indian sub-continent, rely on their parents in most matters including marriages, even at that age.

A person who has passed the age of 21 years must be admitted on his own right whether he is unmarried and/or fully dependent on the parents. There is no scope under this Rule by which a person who has passed the age limit can come to the U.K. for settlement with his or her parents;⁴²⁸ because after that age he/she is no longer a member of the family unit overseas for the purposes of the Immigration Rules.

For children under the age of 18 years the time of application for an entry clearance is not crucial if it is made well before they are 18 years old. For children above the age of 18 and below 21

years of age the application for an entry certificate is crucial particularly when regard is had to the fact that to obtain an entry clearance may take up to 2 years. For this reason it is important to be clear on when an application for an entry clearance is made. It is an established law that an application for an entry clearance is made when a request is tendered for it in "quite unambiguous terms ... to be issued to a particular person".⁴²⁹ The request which can only and must be made to an entry clearance officer may be oral, or in writing through an application letter or by filling a form given by the entry clearance officer. Thus "... tentative enquiries, or preliminary steps towards ascertaining what is required or indications of an intention to make an application are not regarded as an 'application duly made' ".⁴³⁰ The Immigration Act 1971 refers to an "application duly made"⁴³¹ and the Tribunal has ruled that an application may be held to have been "duly made" even though it does not contain particulars required for consideration provided that the request for an entry clearance, whether verbally or in writing, is made in unambiguous terms for an entry clearance to be issued to a particular person.⁴³²

An application duly made for entry clearance before one is over 21 years will be a valid ground for a claim to enter the U.K. as a member of a family unit overseas even when the person is over the age limit of 21 years, provided the consideration arises from the application. It is also important to note that children under the age of 18 years run a great risk if they do not apply for entry clearances for the purpose of settlement well before they are 18 years.

(c) Parents and Grandparents: Widowed mothers, widowers aged 65 or over and parents travelling together of whom at least one is aged 65 or over, should be admitted for settlement if wholly or

mainly dependent upon children settled in the U.K. who have the means to support them and any other relatives who would be admissible as their dependants and adequate accommodation for them. Where a parent has remarried admission should not be granted unless he or she cannot look to the spouse or children of the second marriage for support, and the children in the U.K. have sufficient means and accommodation to support both the parent and any spouse or children of the second marriage who would be admissible as dependants.⁴³³ The same provisions apply to grandparents.⁴³⁴

People seeking entry for settlement in the U.K. as dependants of people already settled here must have entry clearances issued to them for that purpose.⁴³⁵ In BANO v HOME SECRETARY,⁴³⁶ the appellant, a widowed mother and citizen of India, applied for a revocation of the conditions attached to her admission as a visitor to children already settled in the U.K. so that she could be entitled to settlement as a dependant. The Tribunal held that the fact that she may be dependent on the children since she arrived in the U.K. is irrelevant since, to qualify for settlement as a dependant one has to show that he/she was dependent before he/she came to the U.K.. Although no reference was made as to whether a person who entered originally as a visitor may have conditions varied so as to enable him/her to settle in the U.K. the case proceeded on the basis that that was possible. Under the present rules it is in fact possible to make an application for variation of leave to remain in the U.K. for settlement if one came in originally as a visitor or in some other capacity.⁴³⁷ That being so, it follows that a person wishing to come into the U.K. for settlement is required to have an entry clearance for that purpose only if he is coming to the U.K. as a dependant to settle. If he comes in some other

capacity like that of a visitor then he need not have an entry clearance for the purpose of settlement as a dependant but in that event should he wish to have a variation of the conditions of stay so as to remain as a dependant of settled relatives which entitles him to settle, then it must be shown that at the time he came in that other capacity he was dependent on the people he/she wishes to stay with as a dependant. That is the effect of the above case.

Accommodation: The Sponsor must show that he is willing and able to support and accommodate his dependants without recourse to public funds. The problem that has arisen in most cases is that of accommodation. It was held very early that accommodation belonging to someone else other than the sponsor is not within the above provision.⁴³⁸ In another case⁴³⁹ the question of adequacy of accommodation was examined at some length. In that case evidence was given that the sponsor had rented a room for his father near his own. He was paying £3 a week for the room, unfurnished, and it was understood that the "lease" for the room could be terminated on 2/4 weeks notice by either party. A letter was also produced from a Medical Officer of Health of a different corporation (the sponsor lived in Glasgow and the letter that came from a Medical Officer of Health was based on houses in Huddersfield) setting out the overcrowding standards under the Housing Acts which had been approved by the Council (Huddersfield Council) and on the basis of the letter it was argued that the rooms in the sponsor's house might well satisfy the requirements and enable his father to live with him. In the alternative it was said that the sponsor intended to obtain a larger house.

On the above facts the Tribunal held that it "... would be

difficult to accept the arrangements stated ... established that the sponsor 'had' adequate accommodation available for his father".⁴⁴⁰ It further rejected the Medical Officer of Health's report because it was based on a different council and not Glasgow Corporation.

It has also been held that the owner of a 2-bedroom corporation house in which he and his wife live has not got adequate accommodation for his 2 parents and brother coming to stay with him as dependants and this was the case even if the sponsor intended to house his dependent brother temporarily with a friend until he purchased a bigger house.⁴⁴¹ The Tribunal was heavily influenced by the sponsor's meagre means in this case and therefore the case must not be taken as stating a general principle. In fact, it has been held by the Tribunal that when deciding whether a sponsor in the U.K. has adequate accommodation for the reception of a dependant parent, with or without relatives, bona fide arrangements made for acquiring additional accommodation are not to be precluded.⁴⁴² In this case the sponsor had purchased his own house which had 5 bedrooms in which he lived with his wife and 4 children. 4 dependants were coming from India and since the maximum number of people allowed in his own house was 7 he had entered into an agreement with a neighbour who gave evidence that he owned a house with 3 bedrooms and 2 living rooms in which he lived with his wife alone, having no children, and that he had agreed with the sponsor to give him free accommodation subject to sharing certain outgoings e.g. rates and charges for gas and electricity. He further stated that he came from the same village as the sponsor and knew the sponsor's mother and three brothers. The sponsor's salary together with his wife was £3,743 p.a.. In the circumstances the Tribunal

was convinced that the sponsor had adequate accommodation.

Although each case will be considered on its own particular facts it can be surmised that a person who has already purchased his own house and has a reasonable income will be considered as having adequate accommodation even when he has to rely on rented accommodation to accommodate those dependants he cannot take into his own house.

Public Funds: A sponsor must, in addition to accommodation, be able to support his dependants without recourse to public funds. In a case in which in 1973 a sponsor earned £30 a week, had saved £563 and intended to buy a bigger house in which he, his wife and 3 dependants who had applied to come and settle in the U.K. as his dependants it was held that he (sponsor) did not have adequate means to support the dependants.⁴⁴³ To be able to support dependants one must therefore be able to show that he is in a position to maintain in the U.K. a reasonable standard of life both for himself and his dependants.⁴⁴⁴ It is not quite clear whether the "reasonable standard of life" is that which is reasonable in the opinion of the appellate authorities or of the applicants. It is obvious though that the standard of life, must be in relation to the United Kingdom.

As a condition of admission a person wishing to come to the U.K. for settlement must show that he is wholly or mainly dependent on the sponsor. To be wholly or mainly dependent on a sponsor one must show that the dependence is "... main and necessary".⁴⁴⁵ Thus where it is shown that the resources of the parents are insufficient to meet their own needs then dependence on a sponsor is proved. In a case where it was argued that the parents were mainly dependent

on remittances of a sponsor in the U.K. because by custom the father regularly distributed all the income from his two farms in Pakistan to three other sons in that country, it was held by the Tribunal that the payment by the sponsoring son had not been proved to be necessary for the maintenance of the applicants.⁴⁴⁶ It may have been that the sponsoring son contributed most to the upkeep of the parents but that did not prove that they were mainly dependent on him. In other words the word "mainly" does not mean "mostly" and accordingly whether the remittances are small or substantial, they do not of themselves prove dependence. In the same case the Tribunal, in what is a startling and probably wrong view, said that the fact that the applicants chose to distribute income from his two farms to his sons, whether or not because of a prevailing custom, cannot be taken into account in applying the U.K. immigration control rules. It is submitted that that view is wrong. Dependence is a question of fact and may be caused by what may or may not be objectionable customs and traditions in the eyes of the immigration authorities. It is a "relevant consideration" to take into account such a custom as in the cases of customary marriages or adoptions. One cannot, on the one hand, recognise customary marriages and, on the other hand, refuse to recognise customs relating to the distribution of property when deciding on what facts are "relevant considerations". The problem that the Tribunal should have addressed its mind to is whether or not, on the balance of probabilities and having regard to the actual situation of the applicants, they were mainly dependent on the sponsor. It is impossible to divorce custom from an applicant when considering their physical or emotional state for the purpose of immigration law. It is a necessary fact when considering whether or not applicants can or cannot manage with the remittances given to them by the sponsor.⁴⁴⁷

Dependence is judged mostly on the amount of financial assistance given but in very exceptional cases dependence may be proved by emotional or physical dependence; for example a medically retarded adult child will be admitted as a dependant.⁴⁴⁸ Dependence must also exist at the time of application for an entry clearance. If on an appeal from a refusal of an entry clearance there is evidence of subsequent facts which if before the entry clearance officer might have influenced his decision in indicating some change in the applicant's original circumstances, then it should form the basis of a new application, and the applicant must make a new application.⁴⁴⁹ If, for example, the applicant were said not to be dependent on the sponsor by the entry certificate officer and by the time the appeal goes to the adjudicator or the Tribunal, as the case may be, new and subsequent evidence shows that he/she is now dependent on the sponsor, then a new application must be made. There are exceptions to this rule, particularly where and when the appellate authorities think that a new application would, in all the circumstances, be undesirable.⁴⁵⁰

Dependants: Having settled the above problems it now remains to be seen who qualify as dependants. It is clear from the Rules that this provision is intended for widowed mothers, widowers aged 65 or over, parents travelling together of whom at least one is aged 65 or over and any other relatives admissible as dependants. Parents and grandparents in those categories are admissible on grounds of dependence but a parent or a grandparent who has remarried should not be granted admission unless he or she cannot look to the spouse or children of the second marriage for support. In PHILIPS v ENTRY CERTIFICATE OFFICER, KINGSTON, JAMAICA,⁴⁵¹ an unmarried mother under the age of 65 years applied for an entry certificate to enable her to settle in

the U.K. as a "widowed mother". The Tribunal held that unmarried mothers were not to be equated with "widowed mothers". In its opinion "... the propensity in [the West Indies] towards extra-marital relationships resulting in childbirth cannot have been unknown when the immigration Rules were drafted and approved and in the circumstances the omission of a reference to unmarried mothers ... seems ... to justify the inference that it was a deliberate exclusion rather than an accidental omission".⁴⁵²

Because of the literal interpretation given above to "widowed mothers" it is clear that the term cannot be extended any further than including "widowed grandmothers". There is clearly no age limit required in the case of such widowed mothers before they become admissible as dependants. Dependants were generally, under the old Rules, required not to take employment and for that reason there are cases where one is refused admission because being 30 years old there was no guarantee that she could not take employment.⁴⁵³ There is no such requirement under the present Rules and it is therefore submitted that as long as one establishes that she is a "widowed mother" as defined then the question of her youth and consequent fears of her taking employment are not matters that should be taken into account.

There has been no occasion to define the term "widowers" but if the literal interpretation is followed then it extends only to a parent or a grandparent who is a widower and over the age of 65 years. A parent in this case probably includes an adoptive parent but it will not include the natural father of an illegitimate child - following the decision of the Re M. (an infant),⁴⁵⁴ in which it was held that the law does not recognise the natural father of an illegitimate child. This means, on the other hand, that the law recognises

the natural mother of an illegitimate child but taking the restrictive and literal interpretation of the word "widowed mother" it does appear, surprisingly, that an unmarried mother of an illegitimate child settled in the U.K. will not be considered a "widowed mother" and accordingly will not in immigration law be admissible as a dependant whereas, in fact, she is a dependant.

Widowers coming on their own must be over 65 years of age in order to be admissible as dependants but where a married man is coming with his wife who is 65 or more years old, then he need not be 65 years old.

The words parent and grandparent include, by virtue of the words "second marriage" in the Rule, step-parents or step-grandparents. They may both be 65 years old or over, or one of them may be 65 years or over in order to be admissible for settlement provided dependency has been satisfactorily shown.

(d) Distressed Relatives: Relatives of people settled in the U.K. or who are on the same occasion being admitted for settlement will be admitted to the U.K. as distressed people if they are 65, or more, years old and their settled relatives are able to support them and to provide adequate accommodation for them.⁴⁵⁵ To qualify as a distressed relative the person must be isolated (that is, living alone with no relatives in his own country to turn to) and distressed (that is, having a standard of living substantially below that of his own country). The concession should not be extended to people below the age of 65 save in the most exceptional compassionate circumstances, but may in such circumstances be extended to parents and grandparents and to more distant relatives.⁴⁵⁶

In the first place, a person wishing to come to the U.K. as a

distressed relative must have an entry clearance granted for that purpose.⁴⁵⁷

In the second place, the person already settled in the U.K. or is on the same occasion being admitted for settlement must be able and willing to support them and provide accommodation for them as well. To show that he can support and accommodate them the same things as are discussed above in relation to admission of parents and grandparents as regards support and accommodation must be proved.

In the third place, the person to be admitted must be a "relative" in the sense the word relative is defined. The Rule lists brothers, sisters, aunts and uncles as near relatives. There is scope for extension of the word "relative" in its present context which is "... the Secretary of State will authorise the admission as distressed relatives of the near relatives (brothers, sisters, aunts, uncles) of people settled in the U.K.". In order to be admissible one must be 65 years or more and be "distressed". The word "distressed" means isolated, that is, living alone with no relatives to turn to in one's own country; and distressed, that is, having a standard of living substantially below that of his own country. According to the case of MUKHOPADHYAY v ENTRY CLEARANCE OFFICER, CALCUTTA,⁴⁵⁸ it was held that the definitions of the words "isolated" and "distressed" which are to be taken in aggregate and not merged were exhaustive and the words are intended to be taken in that narrow sense for the purpose of immigration control. The Tribunal did, however, find it difficult to interpret the definitions and in particular the provision "... having a standard of living substantially below that of his own country". It recommended an amendment to the Rule; this has not yet been made. In the meantime to determine the

the standard of an applicant's living "... regard must be had to the individual circumstances of the applicant and to those of his family and of the circle in which he moves in order to make a realistic comparison of their respective standards of living and to ascertain if the applicant's standard of living has fallen substantially below that of the relatives and friends".⁴⁵⁹

To be isolated, that is, living alone with no relatives to turn to, has been held to mean that there are no relatives "... who would at all willingly accept responsibility for (the distressed persons) in their homes".⁴⁶⁰ The fact that one is living with relatives does not on that score alone make the person any less isolated if the relatives are unwilling to help.

Under the Rules admission to the U.K. should not be given to people under the age of 65 years except in the most exceptional compassionate circumstances. A parent or a grandparent and even a distant relative may be thus exceptionally admitted into the U.K. as dependants notwithstanding that they are below the age of 65 years if they are distressed and isolated.

(e) Husbands: A passenger who is married to a woman settled in the U.K. or is on the same occasion being admitted for settlement is himself to be admitted for settlement if he holds a current entry clearance granted to him for that purpose.⁴⁶¹ The general disqualifications based on false representation, deportation orders and so on apply with equal force.⁴⁶² Husbands cannot, however, be excluded from admission on grounds of restricted returnability or on medical grounds.⁴⁶³ Under the old Rules it was virtually impossible for husbands to be allowed to come and remain in the U.K. with their wives in spite of the fact that their

wives were settled in the U.K. unless there were special considerations making exclusion undesirable.⁴⁶⁴ It has been argued by J.M. Evans that the old Rules were sexually discriminatory and caused particular hardship to women of Asian origin who wanted to marry men from the Indian sub-continent.⁴⁶⁵ This was obviously the case and accordingly with the accession of the U.K. to the E.E.C. membership the discrimination became glaringly grotesque as women employees from the E.E.C. member states were allowed to bring their husbands.⁴⁶⁶ Eventually the discrimination was abolished by a series of amendments.⁴⁶⁷

New Rules have again been drafted which give the immigration authorities more power to refuse settlement where the marriage was one of convenience and/or the parties have no intention of living together permanently as man and wife. The draft Rules are being challenged in Parliament but if they become law then the settlement of a husband in the U.K. with his settled wife will no longer be unconditional since he will be subjected to a 12 months test period.⁴⁶⁸

(f) Marriages: A man seeking to enter into the U.K. for marriage to a woman settled in the country and intending to settle himself should be admitted if he holds a current entry clearance for that purpose. If he holds such an entry clearance then unless he ^{is} otherwise disqualified⁴⁶⁹ he will be admitted initially for 3 months and advised to apply to the Home Office once the marriage has taken place for the time limit on his stay to be removed. Further, if he proves that one of his grandparents was born in the U.K. and Islands he should be admitted for settlement immediately on production of a current entry clearance showing that he comes to the U.K. for the purpose of marriage to a U.K. settled woman.

Under the present Rules which are due for amendment as indicated

above there is no way one can invalidate a formally celebrated but sham marriage concocted for the purpose of immigration law.⁴⁷⁰ In SILVER v SILVER,⁴⁷¹ the wife who was a German subject, had gone through a form of marriage with the respondent, who was a British subject, in order to enable her to remain in England. The spouses separated immediately after their arrival in the U.K.; ^{they} never cohabited, and met only twice in the next 29 years when the wife commenced proceedings for the nullification of the marriage as she wanted to marry another man. Collingwood J. held that as the parties had freely entered into the marriage contract with the intention of becoming man and wife, the marriage was perfectly valid and could not be affected by any mental reservations.⁴⁷² The Scottish Courts have taken a different and indeed startling view which might be a source of difficulties in family law although it is a straight forward matter in immigration law. In MAHMUD v MAHMUD,⁴⁷³ a man and a woman went through a ceremony of marriage on February 27, 1975 before the registrar in a registry office in Glasgow. They did not live together thereafter or have any sexual relations. The ~~husband~~ ^{husband} raised an action in 1977 for a declarator that the marriage was null and void by reason of lack of consent. The Court was told that both parties were practising Moslems and that the pursuer believed that she would not be truly married until there had been a religious ceremony conducted in accordance with the tenets of the Moslem faith. The religious ceremony never took place and on that ground the court took the view that "... the appearance before the registrar was solely, to comply with the formalities of Scots law as to the constitution of a marriage in Scotland", and the woman's consent was given in that belief and the belief that there would be a religious ceremony afterwards. Since that religious ceremony never took place there was no consent and the girl did not therefore "... agree to

be married by that procedure" i.e. of celebrating the marriage before the registrar as required under Scottish law. Like in the case of Silver above, in this case there was no consummation of the marriage and the parties never saw each other.

The differing views of the two courts have great repercussions in family law but in immigration law they are simply marriages and whether a court of law declares them valid or not will not, in immigration law, matter that much because under the Rules a marriage that is sham is as valid as one that is not and it follows that a person will invariably be admitted for settlement if it has taken place.

In most cases there will be a prohibition to take employment imposed on men admitted into the U.K. for the purpose of marriage and they are of course admitted in a temporary capacity,⁴⁷⁴ and, a man admitted in a temporary capacity has not got an unfettered right of settlement, without regard to other relevant considerations under the Rules on his subsequent marriage to a woman settled in the U.K..

A woman seeking to enter into the U.K. for the purpose of marrying a man settled in the U.K. should be admitted if the immigration officer is satisfied that the marriage will take place within a reasonable time. She may be admitted for up to 3 months and advised to apply to the Home Office for removal of the time limit once the marriage has taken place.⁴⁷⁵

It may also be appropriate to impose prohibition on employment.⁴⁷⁶ In any case they may be inadmissible for concealing material facts or for giving false information and so on.

(g) Returning Residents: There are two categories of

returning residents; that is, (i) Commonwealth citizens who were settled in the U.K. before the coming into force of the Immigration Act 1971 and were settled in the U.K. at any time during the 2 years preceding their return and⁴⁷⁷ (ii) other non-patrials who were settled in the U.K. when they left and they have not been away for more than 2 years.⁴⁷⁸

With regard to the first category of returning residents the Immigration Act provides that they must be settled in the U.K., i.e., be ordinarily resident without being in breach of the immigration laws, and they must not be subject to any restriction on their leave to remain.⁴⁷⁹ In addition the Rules require that they must have been settled in the U.K. during the two years preceding their return to the U.K..⁴⁸⁰ In R v HOME SECRETARY EX PARTE MUGHAL,⁴⁸¹ it was held that such a returning Commonwealth citizen has not only to be settled in the U.K. at the coming into force of the Immigration Act 1971, but he must also show, on the proper construction of s.1(2) of the Act that he was physically present in the U.K.. Moreover, the effect of s.1(5) of the Act, depriving the Secretary of State power to make rules making such returning Commonwealth citizens any less free than they were, was that such a citizen must satisfy an immigration officer that he is ordinarily resident in the U.K., or had been so at the time during the 2 years preceding his entry. Ordinary residence for the purpose of this section means being in the U.K. without being in breach of the immigration law or Rules. An appellant must therefore show that his first entry was lawful in order to succeed under this head. A person may have entered clandestinely and still be considered as lawfully ordinarily resident if he entered the U.K. before March 9, 1968. It was held in D.P.P. v BHAGWAN,⁴⁸² that there was under the Commonwealth Immigrants

Act 1962, no duty imposed by implication on a Commonwealth citizen to present himself to an immigration officer for examination on his arrival in the U.K.. It follows that if a person entered into the U.K. clandestinely before the above date his entry was perfectly lawful and if he remained in the U.K., in the physical sense of the term, when the Immigration Act 1971 came into force then he qualifies as a settled Commonwealth citizen.

A person who claims to have been ordinarily resident in the U.K. when the Immigration Act 1971, came into force must prove also that he was lawfully ordinarily resident in the country, i.e., he entered and remained in the country without being in breach of the immigration laws. The onus is on him to show this.⁴⁸³

Commonwealth Citizens: A Commonwealth citizen who qualifies for admission under this head, his family i.e., his wife and children under the age of 16,⁴⁸⁴ are to be admitted for settlement at the time of entry of the man or at a later date irrespective of whether they have been previously resident in the U.K. or not.

Under the Rules a settled person or a person who is on the same occasion being admitted for settlement will be allowed to bring his wife and children under the age of 18 if he can show that he is able and willing to support them. However it is specifically provided that this requirement does not apply to Commonwealth citizens who have a right of abode or who were settled in the U.K. on the coming into force of the Immigration Act 1971.⁴⁸⁵ The effect of this is to comply with s.1(5) of the Immigration Act 1971, which provides that wives and children of people settled in the U.K. at the date of coming into force of the Act shall not be made any less free than they were. Accordingly a person who has qualified under this

head as a settled Commonwealth citizen does not have to show that he can support and accommodate his wife and children before they (wives and children) are admitted into the country for settlement as dependants.⁴⁸⁶

Since the decision of the Court of Appeal in the case of R v CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT,⁴⁸⁷ it is clear that the wife of a Commonwealth citizen who has lost her Commonwealth citizenship by reason of her country going out of the Commonwealth will not be covered by s.1(5) of the Immigration Act 1971, and accordingly the husband must show that he can support and accommodate her with the children. In addition she must have an entry clearance which is not mandatory for other wives who qualify under s.1(5).

With regard to the second category, that is, non-patrials from foreign and Commonwealth countries who were settled in the U.K. before they left and who have not stayed away for more than 2 years, they will be admitted as returning residents if they show that they were so settled before they left, that they did not receive assistance from public funds towards the cost of leaving and that they have not been away for more than 2 years. If they have been away for a longer period they will still be admissible if they have lived in the U.K. for most of their lives or for a considerable period and they have close family ties in the country.⁴⁸⁸ Possession of an entry clearance for this category of people is not mandatory unless one is not a Commonwealth citizen in which case he must have a visa. Commonwealth citizens are, however, advised to get entry clearances. Members of their families i.e. wives and children under the age of 19 years coming for settlement must have entry clearances before they can be admitted. Moreover each person is required to show that he can support and accommodate his dependants without recourse to public funds.⁴⁸⁹ There is no power to refuse entry to such a wife

and children under the age of 18 years on medical grounds or for reasons of a criminal record or because it is conducive to the public good. However, entry may properly be refused where such wife or children are subject to a deportation order.⁴⁹⁰

A person who is not a patrial and falls under this head does not have a right to enter the U.K. simply on the ground that he is resident there. He must also satisfy the immigration officer that he has been lawfully settled, that is, he has been lawfully ordinarily resident during the past two years before his return. As was noted in relation to the Commonwealth citizens settled in the U.K. before the coming into force of the Immigration Act 1971, a person who came clandestinely into the U.K. before the coming into force of the 1968 Commonwealth Immigrants Act, that is, before March 9, 1968, will under the "Bhagwan Gap" be considered to have entered and remained in the U.K. legally.⁴⁹¹

The onus of proving lawful entry into and the subsequent stay in the U.K. is on the person.⁴⁹²

Ordinary Residence: Does being ordinarily resident in the U.K. mean, literally being in the U.K. physically? In most cases it does mean that but there is no need to restrict the meaning of the term to the mere physical presence. In ENTRY CERTIFICATE OFFICER, BOMBAY v JOSHI,⁴⁹³ the respondent first entered the U.K. in 1955 and he was joined there by his wife in 1957. A son was born to them in the U.K.. The family returned to India in 1958 and later the respondent was admitted to the U.K..unconditionally in 1964. In June 1964 he entered into salaried employment with a U.K. firm as an overseas sales representative. He left for India in 1965 on the firm's business and returned to the U.K. in December 1966 and was admitted conditionally

for 6 months. On his application the condition limiting his stay was revoked in February 1967. The respondent again left for India in August 1968 as the company's overseas representative and continued working there until the firm's liquidation in January 1970. In June 1971 he applied for an entry certificate as a returning resident but his application was refused on the ground that he had not been ordinarily resident in the U.K. during the previous 2 years.⁴⁹⁴ It was held by the Tribunal (affirming the decision of the adjudicator) that on the facts above although the respondent was physically in India during the preceding 2 years he had not up till January 1970 lost his status as a person ordinarily resident in the U.K. because (inter alia) he had left the U.K. on the business of the employers who were based in the U.K., and both he and the company had intended the absence to be temporary and accordingly he could properly be regarded as a returning resident.

The fact that the respondent had never set up a permanent home in the U.K. and had no property or business connections in the country were considered important but insufficient on themselves to show that a person is not resident ordinarily in the U.K..⁴⁹⁵

A passenger who has been away from the U.K. too long to benefit from the above Rule may nevertheless be admitted, if for example, he has lived here for most of his life. In COSTA v HOME SECRETARY,⁴⁹⁶ it was held that the example given above, that is, "... he has lived here for most of his life" is by way of guidance but "... the underlying principle of the paragraph was that if a person could not establish that he had not been away from the U.K. for longer than 2 years that person must show strong connections with the country by a combination of length of residence and family or other ties".⁴⁹⁷ In other words, the provision gave the immigration officers a

discretion and that discretion is not to be exercised in favour of a person unless he could show that he or she has strong connections with the U.K. through length of residence and family or other ties. Although the Tribunal found that the appellant in the case was ordinarily resident in the U.K. for the first 3 years of her stay and that she had very strong family ties in the country it (the Tribunal) refused her leave to remain under the section because she had stayed in the country illegally in breach of the Immigration Rules by overstaying. Accordingly, in order for a person who wants to come to the U.K. under the provision to be admitted he must prove that he was lawfully ordinarily resident in the U.K. before he/she went away or that he was settled in the U.K. before he went away and for this reason, and particularly since it has been held that a person may be ordinarily resident if he entered legally but remained in breach of his/her conditions of stay,⁴⁹⁸ it can be inferred that in a suitable case a person who has remained in the U.K. in breach of immigration law may be exceptionally allowed to stay in the country under the provision provided he entered lawfully.

Family Ties: What will amount to strong family ties and/or long residence are questions of fact. Thus in one case,⁴⁹⁹ a 50 year Indian who had lived in the U.K. for 16 months more than 13 years lived earlier was held not to have/in the U.K. for a considerable length, and been in another case⁵⁰⁰ a 66 year old woman who had lived in the U.K. for 11 years was held not to have strong family ties in the U.K. although the Tribunal said that her residence was considerable.

L. Grant and J. Constable submit, with justification, that the Tribunal has adopted a comparative approach in ascertaining strong family ties - "thus an applicant with more relatives in his country of origin than in the U.K. is likely to fail in the appeal" - and

considerable length of residence has tended to be calculated by examining the applicant's age in relation to the period of his residence in the U.K..⁵⁰¹ If one has lived in the country for a short time the family ties must be strong in order to counter-balance.

A passenger whose stay in the U.K. was subject to a time limit and who returns after a temporary absence abroad has no claim to admission to re-enter/^{and} should be dealt with in the light of all the relevant circumstances and the same time limit may be re-imposed or it may be more appropriate to treat him as a new arrival.⁵⁰² This provision is intended for people who do not qualify either as returning residents or as people who were ordinarily resident in the U.K. previously but have been away for more than two years. It may be appropriate to consider questions on compassionate grounds here.

A person who was ordinarily resident in the U.K. and has stayed away from the U.K. for longer than 2 years and cannot show that he has strong family ties or that he had been in the U.K. for a considerable length of time and is not a passenger whose stay in the U.K. was subject to time limit returning after a temporary absence may nevertheless apply to the Secretary of State for admission into the U.K.. As this would be outside the Immigration Rules there is no remedy against the person refused entry in such cases under the Appeals system.⁵⁰³

Finally in the case of returning residents the requirement that they must have not been away for longer than 2 years is/^a mandatory requirement incapable of further extension. Applications for entry clearances must be made within the 2 years and the return must also take place within 2 years.

FOOTNOTES

(Chapter Three)

1. The Channel Islands, the Isle of Man, the Irish Republic and the U.K. together form a common travel area; passengers who have been examined for the purpose of immigration control at one point of the common travel area are thereafter free to enter any other part without further examination. H.C. 79 (1973) para. 8 and H.C. 81 (1973) para. 6.
2. A citizen of the U.K. and Colonies (or a British subject not possessing that citizenship or the citizenship of any other Commonwealth country or territory) who holds a U.K. passport issued in the U.K. and Islands or the Irish Republic should be admitted freely without proof of patriality unless the passport is endorsed to show that he is subject to immigration control. Citizens of the U.K. and Colonies holding U.K. passports wherever issued and have been previously been admitted into the U.K. for settlement are to freely re-admitted. H.C. 79 (1973) para. 5.
3. H.C. 79 (1973) para. 10 and H.C. 81 (1973) para. 8.
4. Albania, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, U.S.S.R.; all countries of Asia except Bahrain, Israel, Japan, Kuwait, Maldives Islands, Republic of Korea, Qatar and Turkey; all countries of Africa except Algeria, Ivory Coast, Morocco, Tunisia and the Republic of South Africa; and Cuba.
5. For example, U.S.A., and E.E.C. member countries.
6. Immigration Act 1971, Schd. 4 para. 1(3). The directions are not made public and are different from the published Rules.
7. Cmnd. 3387 p. 10.
8. *ibid.*
9. H.C. 79 (1973) para. 11; E.C.O., JAMAICA v HOLMES [1975] Imm. A.R. 20 p. 20.
10. The Times, October 25, 1976 p. 2.
11. Immigration Act 1971, s.13(3).
12. The Times, May 28, 1976.
13. H.C. 79 (1973) *passim*.
14. E.C.O., NEW DELHI v BHAMBRA [1973] Imm. A.R. 14; ISLAM v E.C.O., DACCA [1974] Imm. A.R. 83; KHAN v E.C.O., KARACHI [1975] Imm. A.R. 64.
15. RAVAT v E.C.O., BOMBAY [1974] Imm. A.R. 79.

16. M. SINGH v E.C.O., NEW DELHI [1975] Imm. A.R. 118.
17. MUKHOPADHYAY v E.C.O., CALCUTTA [1975] Imm. A.R. 42.
18. PHILIPS v E.C.O., KINGSTON, JAMAICA [1973] Imm. A.R. 47.
19. [1975] Imm. A.R. 26 Q.B.D..
20. Alex. Lyon, "The New Statesman"; May 28, 1976 p. 702.
21. *ibid.*
22. See n.4 *supra*.
23. H.C. 80 (1973) para. 10: no appeal until one leaves the U.K..
24. The Times, May 2, 1976 (C.A.).
25. *ibid*, May 28, 1976 (Q.B.D.).
26. H.C. 80 (1973) para. 10.
27. Cmnd. 4610 Rule 31.
28. [1974] Imm. A.R. 87.
29. *ibid.*, p. 88.
30. Immigration Act 1971, s.19(2).
31. *ibid.*
32. [1974] Imm. A.R. 55.
33. H.C. 79 (1973) para. 12(a) and H.C. 81 (1973) para. 10(a).
34. R. Moore and T. Wallace, p. 10.
35. R. v HOME SECRETARY, EX PARTE SAFIRA BEGUM; The Times, May 28, 1976.
36. *ibid.*
37. *ibid.*
38. But see Roskill L.J. in R. v CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT, EX PARTE SALAMAT BIBI [1976] 1 W.L.R. 979 p. 985.
39. [1972] Imm. A.R. 176.
40. R. v IMMIGRATION APPEAL TRIBUNAL, EX PARTE KANDASAMY JAYAVERASINGHAM [1976] Imm. A.R. 137 Q.B.D.
41. R. v PETERKIN (ADJUDICATOR), EX PARTE SONI [1972] Imm. A.R. 253 Q.B.D..
42. *ibid.*

43. The only redress is for the Secretary of State to reprimand an officer responsible.
44. PERWEEN KHAN v HOME SECRETARY [1972] Imm. A.R. 245.
45. CHAGPAR v HOME SECRETARY [1972] Imm. A.R. 137.
46. [1973] Imm. A.R. 38.
47. R. v PETERKIN (ADJUDICATOR), EX PARTE SONI [1972] Imm. A.R. 253 pp. 255-56 per Lord Widgery.
48. For example RAMJANE v CHIEF IMMIGRATION OFFICER, GATWICK AIRPORT [1973] Imm. A.R. 84.
49. H.C. 79 (1973) para. 12(b) and H.C. 81 (1973) para. 10(b).
50. For example, E.C.O. BOMBAY v THAKERAR [1974] Imm. A.R. 60.
51. *ibid.*
52. HOME SECRETARY v THAKERAR [1976] Imm. A.R. 114 pp. 117, 118 and 119.
53. *ibid.*
54. *ibid.*, p. 118.
55. [1973] Imm. A.R. 57.
56. E.C.O. NEW DELHI v. UMARJEET KAUR TH/5497/74 (552) unreported.
57. HUDA v E.C.O. DACCA, [1976] Imm. A.R. 109. In MUTHULAKSAMI v HOME SECRETARY [1972] Imm. A.R. 231 a change from a dentistry course to an English course was held to be a material change requiring a new application.
58. HOME SECRETARY v IDOWU [1972] Imm. A.R. 197.
59. H.C. 79 (1973) para. 14 and H.C. 81 (1973) para. 12.
60. *ibid.*
61. Immigration Act 1971, S. 24(1)(c) and s.8(1).
62. THE AZAM CASE [1973] 2 All E.R. 765.
63. Immigration Act 1971, s.2(1)(c).
64. H.C. 79 (1973) para. 14 and H.C. 81 (1973) para. 12.
65. *ibid.*
66. H.C. 79 (1973) para. 58 and H.C. 81 (1973) para. 60.
67. *ibid.*

68. *ibid.*
69. H.C. 79 (1973) para. 59 and H.C. 81 (1973) para. 61.
70. [1974] Imm. A.R. 34.
71. *ibid.*
72. SUDJAKARAN v E.C.O., MADRAS [1976] Imm. A.R. 3.
73. *ibid.*, p.6.
74. H.C. 79 (1973) para. 59 and H.C. 81 (1973) para. 61.
75. H.C. 79 (1973) para. 60 and H.C. 81 (1973) para. 62.
76. H.C. 79 (1973) para. 59 and H.C. 81 (1973) para. 61.
77. SUDJAKARAN v E.C.O., MADRAS [1976] Imm. A.R. 3.
78. [1975] Imm. A.R. 61.
79. [1973] Imm. A.R. 5.
80. VEERABHADRA'S CASE TH/1198/71; 1.4.71 unreported.
81. H.C. 79 (1973) paras. 14 and 12 and H.C. 81 (1973) paras. 61 and 63.
82. *ibid.*
83. LIBERTO v IMMIGRATION OFFICER, HEATHROW AIRPORT, [1975] Imm. A.R. 61.
84. VEERABHADRA'S CASE TH/1198/71; 1.4.71 unreported.
85. Halsbury's Laws of England 4th edition vol. 18 para. 215 for offences.
86. *ibid.*
87. Extradition Act 1870, s.26.
88. ROYAL GOVERNMENT OF GREECE v GOVERNOR OF BRIXTON PRISON [1971] A.C. 250 p. 267.
89. [1972] Imm. A.R. 38.
90. H.C. 79 (1973) paras. 12 and 14 and H.C. 81 (1973) paras. 62 and 64.
91. *ibid.*
92. Immigration Act 1971, ss. 13(4) and 33(1).
93. *ibid.*, s.13(4).
94. *ibid.*, s.15(1)(b).
95. DERUISH v HOME SECRETARY [1972] Imm. A.R. 48.

96. HOME SECRETARY v SANUSI [1975] Imm. A.R. 114.
97. H.C. 79 (1973) paras. 12 and 14 and H.C. 81 (1973) paras. 63 and 65.
98. *ibid.*
99. IMMIGRATION ACT 1971, s.13(5).
100. SCHEELE v IMMIGRATION OFFICER, HARWICH [1976] Imm. A.R. 1.
101. *ibid.*
102. *ibid.*
103. IN THE MATTER OF M,5,I and N. 248, May 27 1953. - F.L. Auerhach p. 326.
104. MUNK- HANSEN 880/73 (210) unreported.
105. H.C. 79 (1973) paras. 15-23 and H.C. 81 (1973) paras. 13-21.
106. Any person who is required by the Immigration Act 1971 to have leave to enter except as a member of crew of a ship, aircraft or hovercraft.
107. IMMIGRATION OFFICER, LONDON (HEATHROW) AIRPORT v SCHÖNENBERGER [1975] Imm. A.R. 7; H.C. 79 (1973) para. 15 and H.C. 81 (1973) para. 13 and DEVI v E.C.O., NEW DELHI [1976] Imm. A.R. 171.
108. H.C. 79 (1973) para. 16 and H.C. 81 (1973) para. 14.
109. *ibid.*
110. This in fact happened to the author in July 1975.
111. H.C. 79 (1973) para. 16 and H.C. 81 (1973) para. 14.
112. N.L.J. August 14, 1975 vol. 125 No. 5712 p. 801.
113. H.C. 79 (1973) para. 16 and H.C. 81 (1973) para. 14.
114. VAN DUYN v HOME OFFICE (1975) 3 All E.R. 190. It was held that the voluntary act of an E.E.C. national in associating with an organisation (which is to be discouraged for public policy reasons) which involved participation in its activities and identification with its aims, could properly be regarded as a matter of personal conduct within the meaning of E.E.C. Directive 64/221 Article 3(1).
115. H.C. 81 (1973) para. 50.
116. As far as E.E.C. law is concerned the power to refuse entry to an E.E.C. national into the U.K. is too wide under the present U.K. Immigration Rules.

117. H.C. 79 (1973) para. 16 and H.C. 81 (1973) para. 14.
118. H.C. 79 (1973) para. 15 and H.C. 81 (1973) para. 13; E.C.O., NICOSIA, v GEORGIA [1975] Imm. A.R. 151.
119. No person who comes into the U.K. on a temporary capacity will be allowed to change his status from a temporary status to another status e.g. to a permanent status. There is one exception i.e. if he appears to have a prima facie case for settlement as a person of independent means and he has sufficient means under his own control and disposable in the U.K. to support himself and his dependants if any; H.C. 79 (1973) para. 16; H.C. 80 (1973) para. 14; H.C. 81 (1973) para. 8 and H.C. 82 (1973) para. 8.
120. H.C. 80 (1973) para. 8 and H.C. 82 (1973) para. 8.
121. OWUSU v HOME SECRETARY [1976] Imm. A.R. 101 P. 102.
122. H.C. 79 (1973) para. 17 and H.C. 81 (1973) para. 15.
123. [1973] Imm. A.R. 9.
124. *ibid.*, p.9.
125. HOME SECRETARY v GEORGIU [1972] Imm. A.R. 179.
126. R. v LYMPNE AIRPORT CHIEF IMMIGRATION OFFICER, EX PARTE AMRIK SINGH [1968] 3 All E.R. p. 166 per Lord Parker.
127. IMMIGRATION OFFICER, RAMSGATE v COORAY [1974] Imm. A.R. 38.
128. PADMORE v HOME SECRETARY [1972] Imm. A.R. 97, and CHAGPAR v HOME SECRETARY [1972] Imm. A.R. 137.
129. [1975] Imm. A.R. 118.
130. ENTRY CERTIFICATE OFFICER, HONG KONG v LAI [1974] Imm. A.R. 98.
131. See New Law Journal, 1975, vol. 125 p. 802.
132. [1976] Imm A.R. 74.
133. *ibid.*
134. In HUDA v E.C.O., DACCA, [1976] Imm. A.R. 109, the Tribunal allowing entry into the U.K. of the appellant held that documentary evidence of his good employment in a nationalised industry was relevant evidence to be taken into account on his appeal because it provided an incentive to return to Bangladesh on completion of his holiday.
135. BALDACCHINO v HOME SECRETARY [1972] Imm. A.R. 14.
136. [1972] Imm. A.R. 17.
137. HAMILTON v E.C.O., KINGSTON, JAMAICA, [1974] Imm. A.R. 43.

138. Cmnd. 4298 para. 12.
139. [1975] Imm. A.R. 16.
140. *ibid.*, p. 19. Also H.C. 79 (1973) para. 15 and H.C. 81 (1973) para. 13.
141. E.C.O., ACCRA v TACKIE TH/3311/72 (194) unreported.
142. H.C. 79 (1973) para. 18 and H.C. 81 (1973) para. 16.
143. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17.
144. H.C. 79 (1973) para. 18 and H.C. 81 (1973) para. 16.
145. [1973] Imm. A.R. 25.
146. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17. The Commonwealth Immigrants Act 1962, s.2(3)(b) did not so provide. But see R. v. CHIEF IMMIGRATION OFFICER, LONDON AIRPORT, EX PARTE BOSTAN KHAN (1969) unreported where Lord Parker C.J. held that s.2(3)(b) above was designed to meet the case of a student coming to the U.K. to take a particular course of study and then go away.
147. H.C. 80 (1973) para. 12 and H.C. 82 (1973) para. 12.
148. E.g. C. (AN INFANT) v THE ENTRY CERTIFICATE OFFICER, HONG KONG [1976] Imm. A.R. 165.
149. H.C. 79 (1973) para. 18 and H.C. 81 (1973) para. 16.
150. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17.
151. *ibid.*
152. JUMA v HOME SECRETARY [1974] Imm. A.R. 96.
153. E.C.O. v AMUSU [1974] Imm. A.R. 16.
154. *ibid.*
155. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17.
156. E.C.O., LAGOS v AMUSU [1974] Imm. A.R. 16: the Tribunal allowed A. to stay on the ground that in order to get the college's diploma a great deal of study and hard work was required. Isn't this what a correspondence course involves?
157. H.C. 79 (1973) para. 18 and H.C. 81 (1973) para. 16.
158. AYETTEY v HOME SECRETARY [1972] Imm. A.R. 261.
159. *ibid.*, a letter dated 25.6.1970 showing that an exchange control clearance had been given for £600 was held not to show that that exchange control for 1972 and subsequent years of study had been given.

160. MURGAI v E.C.O., NEW DELHI [1975] Imm. A.R. 86.
161. GHOSHI v E.C.O., CALCUTTA [1976] Imm. A.R. 60.
162. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17.
163. PURI v HOME SECRETARY [1972] Imm. A.R. 76; MUTHULAKSHMI v HOME SECRETARY [1972] Imm. A.R. 231.
164. [1972] Imm. A.R. 215.
165. Information subsequently obtained disclosed that the aptitude test described was "a sample aptitude test" and the official test could not be taken by the candidate until the candidate arrived at the school.
166. H.C. 79 (1973) para. 19 and H.C. 81 (1973) para. 17.
167. PURI v HOME SECRETARY [1972] Imm. A.R. 21.
168. E.C.O., NEW DELHI v BHAMBRA [1973] Imm. A.R. 14.
169. ISLAM v E.C.O., DACCA [1974] Imm. A.R. 83.
170. E.g. GHOSHI v E.C.O., CALCUTTA [1976] Imm. A.R. 60.
171. ISLAM v E.C.O., DACCA, [1974] Imm. A.R. 83.
172. R. v IMMIGRATION APPEAL TRIBUNAL, EX PARTE S.G.H. KHAN [1975] Imm. A.R. 26.
173. New Law Journal, 1975, vol. 125, p. 826.
174. GOFFAR v E.C.O., DACCA, [1975] Imm. A.R. 142 and DEY v E.C.O. DACCA [1975] Imm. A.R. 151.
175. GHOSHI v E.C.O., CALCUTTA [1976] Imm. A.R. 60.
176. New Law Journal, August 21, 1975, vol. 125, p. 826.
177. MYEEN -UR- RASHID v E.C.O., CALCUTTA [1976] Imm. A.R. 12, the Tribunal thought that the case fell outside the Immigration Rules.
178. [1974] Imm. A.R. 83.
179. New Law Journal, August 21, 1975, vol. 125, p. 826.
180. E.C.O., NEW DELHI v BHAMBRA [1973] Imm. A.R. 14.
181. *ibid.*
182. DEY v E.C.O., DACCA [1975] Imm. A.R. 142.
183. HOME SECRETARY v VIRDEE [1972] Imm. A.R. 215.
184. H.C. 79 (1973) para. 21 and H.C. 81 (1973) para. 19, and R. v IMMIGRATION APPEAL TRIBUNAL, EX PARTE S.G.H. KHAN [1975] Imm. A.R. 26.

185. ISLAM v E.C.O. [1974] Imm. A.R. 83.
186. H.C. 79 (1973) para. 21 and H.C. 81 (1973) para. 19.
187. It is not mandatory to hold an entry clearance if one is from a Commonwealth country or from a foreign country whose nationals are not required to have visas.
188. New Law Journal, August 21, 1975, vol. 125, p. 826.
A student seeking employment should contact the local office of the Department of Employment - he must give details of his course and its length and a letter from his college authorities stating that the work will not interfere with his studies. Permission to work is given for a specific job and therefore a fresh application must be made for each new job found.
189. H.C. 80 (1973) paras. 13-14 and H.C. 82 (1973) paras. 12-13 and H.C. 79 (1973) para. 22 and H.C. 81 (1973) para. 20.
190. *ibid.*
191. H.C. 79 (1973) para. 22 and H.C. 81 (1973) para. 20. J.M. Evans (at p. 64) submits that a woman admitted for a temporary purpose is not entitled to be accompanied by her husband - that will be sexual discrimination.
192. JUMA v HOME SECRETARY [1974] Imm. A.R. 96
193. *ibid.*
194. HOME SECRETARY v GLEAN [1972] Imm. A.R. 84 and HOME SECRETARY v THAKERAR [1976] Imm. A.R. 114.
195. H.C. 80 (1973) paras. 4 and 12-13 and H.C. 82 (1973) paras. 4 and 13-14.
196. HOME SECRETARY v THAKERAR [1976] Imm. A.R. 114.
197. *ibid.*
198. [1976] Imm. A.R. 69.
199. *ibid.*, p. 73.
200. H.C. 79 (1973) para. 20, H.C. 80 (1973) para. 14, H.C. 81 (1973) para. 18 and H.C. 82 (1973) para. 13.
201. H.C. 80 (1973) para. 13 and H.C. 82 (1973) para. 12.
202. BAIJAL v HOME SECRETARY [1976] Imm. A.R. 34.
203. *ibid.*
204. H.C. 79 (1973) paras. 23-24 and H.C. 81 (1973) paras. 21-22. Under the pre-1973 Rules the "au pair" system was not available to Commonwealth girls but now it is.

205. H.C. 79 (1973) paras. 23-24 and H.C. 81 (1973) paras. 21-22.
206. H.C. 79 (1973) para. 24 and H.C. 81 (1973) para. 22.
207. *ibid.* If she is staying for more than 6 months she must register with the police - H.C. 82 (1973) para. 56.
208. H.C. 79 (1973) para. 24 and H.C. 81 (1973) para. 22.
209. H.C. 80 (1973) paras. 17-18 and H.C. 82 (1973) paras. 15-16.
210. *cf.* H.C. 80 (1973) para. 18 and H.C. 82 (1973) para. 16 in which a girl visitor may be given leave to stay on as an "au pair" girl if the "au pair" arrangement can be proved.
211. HOME SECRETARY v GRANT [1974] Imm. A.R. 64.
212. The rules do not state that an "au-pair" girl must show that she is coming to the U.K. for the purpose of an "au pair" arrangement only. The fact that the word "impliedly" has been introduced means that an "au pair" girl must now show that her intention of coming to the U.K. must be genuine.
213. RAMJANE v CHIEF IMMIGRATION OFFICER, GATWICK AIRPORT [1973] Imm. A.R. 84.
214. H.C. 79 (1973) para. 23 and H.C. 81 (1973) para. 21.
215. This is open to criticism on the ground that guarantees of protection against an "au pair" girl living with a single man cannot be obtained but the majority of the girls will have passed the age of majority.
216. H.C. 79 (1973) paras. 25-37 and H.C. 81 (1973) paras. 23-33.
217. H.C. 80 (1973) para. 15 and H.C. 82 (1973) para. 14. Note: non-Commonwealth and non-E.E.C. trainees are called student employees.
218. H.C. 81 (1973) para. 14.
219. Commonwealth nationals will be advised to obtain entry clearances before departure for U.K. although it is not mandatory. Non-Commonwealth and non-E.E.C. nationals must have visas unless they are exempted.
220. H.C. 80 (1973) para. 15 and H.C. 82 (1973) para. 14.
221. *ibid.*
222. [1972] Imm. A.R. 122.
223. The Rule under which the case was decided provided, as far as material, that a trainee who requires an extension of stay should be granted it if on application "... the Department of Employment report that he is continuing his training and that this is satisfactory": Cmnd. 4295 para. 18 - this is in para materia with the present Rules.

224. M.K. GHANDI TH/1733/71 July 16, 1971 unreported.
225. LATIFF v HOME SECRETARY [1972] Imm. A.R. 76.
226. LIM CHOW TOM v HOME SECRETARY [1975] Imm. A.R. 137.
227. *ibid.*
228. New Law Journal, September 4, 1975, vol. 125, p. 878.
229. [1973] Imm. A.R. 43.
230. cf. with H. LAVENDER & SON LTD. v MINISTER FOR HOUSING AND LOCAL GOVERNMENT [1970] 3 All E.R. 871 in which there was no statutory requirement to refer a matter to another Department for decision.
231. Cmnd. 4295 para. 18 and MUNASHINGE v HOME SECRETARY [1975] Imm. A.R. 79.
232. H.C. 80 (1973) para. 15 and H.C. 82 (1973) para. 14.
233. H.C. 82 (1973) para. 14.
234. H.C. 80 (1973) para. 15.
235. *ibid.*
236. *ibid.*, para. 16.
237. There is no provision made for foreign non-E.E.C. nationals as for the Commonwealth nationals. This restricts the meaning of the clause that "applications from students or would-be students for variation of ... leave will consist mainly of applications of stay ..." (H.C. 82 (1973) para. 12) contrary to the definition of the word mainly in BAIJAL v HOME SECRETARY [1976] Imm. A.R. 34. A foreign non-E.E.C. will therefore not transfer to be a student-employee under H.C. 82 (1973) para. 9.
238. ISLAM v HOME SECRETARY [1975] Imm. A.R. 106.
239. H.C. 79 (1973) para. 25 and H.C. 81 (1973) para. 23.
240. *ibid.*
241. H.C. 79 (1973) para. 33 and H.C. 81 (1973) para. 33.
242. H.C. 82 (1973) para. 29.
243. H.C. 79 (1973) paras. 12, 14 and 59-63.
244. *ibid.*, para. 27.
245. [1976] Imm. A.R. 165.
246. Re N. (AN INFANT) [1955] 2 Q.B. 479 per Denning L.J.

247. H.C. 79 (1973) para. 27.
248. C. (AN INFANT) v E.C.O., HONG KONG, [1976] Imm. A.R. 165.
249. H.C. 79 (1973) para. 37.
250. *ibid.*
251. It does not apply to the wife and children of a Commonwealth citizen who has the right of abode in the U.K. before the Immigration Act 1971 came into force; H.C. 79 (1973) para. 39.
252. H.C. 79 (1973) para. 40.
253. *ibid.*, para. 28 and H.C. 80 (1973) para. 11.
254. CHIPSHAM v HOME SECRETARY [1972] Imm. A.R. 35.
255. ISMAIL v HOME SECRETARY [1973] Imm. A.R. 62. Reference was made that H.C. 80 (1973) para. 11 supported the view without attention given to H.C. 80 (1973) para. 9.
256. H.C. 80 (1973) para. 9.
257. [1976] Imm. A.R. 34.
258. H.C. 80 (1973) para. 11 provides "Young Commonwealth citizens who have come to the U.K. on working holidays will normally have to be admitted for 12 months in the first instance and may, on application, be granted an extension of stay. Having been admitted, however, for employment which is incidental to a holiday, they should be allowed to stay indefinitely, and a total of 5 years is the maximum permitted".
259. BAIJAL v HOME SECRETARY [1976] Imm. A.R. 34.
260. HOME SECRETARY v GRANT [1974] Imm. A.R. 64.
261. *ibid.*
262. [1975] Imm. A.R. 23.
263. MUNASHINGE v HOME SECRETARY [1975] Imm. A.R. 79 - M. was refused to stay as a Commonwealth holidaymaker because it was established that she had been a hardworking full-time member of the staff of a departmental store.
264. H.C. 79 (1973) paras. 25 and 28.
265. H.C. 79 (1973) para. 37 provides that the wife and children under 18 of a person admitted into the U.K. to take or seek employment should be given leave to enter for a period of his authorised stay and para. 39 of the same provides that the rule covers admission of those who are on the same occasion given indefinite leave to enter.
266. H.C. 79 (1973) para. 29 and H.C. 81 (1973) para. 25.

267. MEMI v HOME SECRETARY [1976] Imm. A.R. 129.
268. In BAIJAL v HOME SECRETARY [1976] Imm. A.R. 34 it was held that students wishing to stay on in the U.K. as holiday workers covered more than those whose original entry into the U.K. was in the capacity of holiday workers. The same case should apply to people who come in initially as visitors and wish to stay on as permit-free workers which in reality is a temporary capacity.
269. VAN DUYN v HOME OFFICE [1974] 1 W.L.R. 1107.
270. H.C. 79 (1973) para. 30 and H.C. 81 (1973) para. 26.
271. *ibid.*
272. Immigration Act 1971, s.33(1).
273. IMMIGRATION OFFICER, BRISTOL v DIESTEL [1976] Imm. A.R. 51.
274. Immigration Act 1971, s.33(1).
275. MEMI v HOME SECRETARY [1976] Imm. A.R. 129.
276. *ibid.*
277. E.g. MUNASINGHE v HOME SECRETARY [1975] Imm. A.R. 79.
278. H.C. 80 (1973) para. 5 and H.C. 81 (1973) para. 5.
279. MEMI v HOME SECRETARY [1976] Imm. A.R. 129.
280. *ibid.*, and HOME SECRETARY v STILLWAGGON [1975] Imm. A.R. 132 pp. 136-37.
281. MEMI v HOME SECRETARY [1976] Imm. A.R. 129 p. 132.
282. HOME SECRETARY v MOUSSA [1976] Imm. A.R. 78.
283. H.C. 80 (1973) para. 6 (as amended by Cmnd. 5716) and H.C. 82 (1973) para. 6 (as amended by Cmnd. 5718).
284. H.C. 80 (1973) paras. 24-25 (as amended by Cmnd. 5716) and H.C. 82 (1973) paras. 22-23 (as amended by Cmnd. 5718).
285. *ibid.*
286. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 33.
287. E.E.C. nationals will not be examined.
288. H.C. 79 (1973) para. 25 and H.C. 81 (1973) para. 23.
289. *ibid.*

290. L. Grant and J. Constable, New Law Journal, vol. 125 at p. 877 submit that an employer will normally be required to (i) inform and give details of a vacancy to the Local Employment office and allow them 3 weeks to find a suitable worker; (ii) advertise the vacancy in the press and trade journals and (iii) agree to pay the fares for any worker in the U.K. to come to an interview. He is also required to show that the wages and conditions offered are no less favourable than those for similar work in the district.
291. A list is normally issued by the Department of Employment - New Law Journal 1975, vol. 125, p. 877.
292. New Law Journal 1975, vol. 125, p. 877.
293. *ibid.*, and H.C. 79 (1973) para. 26 and H.C. 81 (1973) para. 24.
294. Immigration Act 1971, s.13(3).
295. H.C. 79(1973) para. 26 and H.C. 81 (1973) para. 24.
296. E.g. R. v IMMIGRATION APPEAL TRIBUNAL, EX PARTE S.G.H. KHAN [1975] Imm. A.R. 26 Q.B.D. I. Macdonald at p. 54 submits that appeals tribunals are entitled to substitute their view of "good reasons" for those of an immigration-officer. This has now been resolved that both immigration officers and the tribunal must follow the Rules.
297. H.C. 79 (1973) para. 26 and H.C. 81 (1973) para. 24.
298. In ANDRONICOU v CHIEF IMMIGRATION OFFICER, LONDON (HEATHROW) AIRPORT [1974] Imm. A.R. 87 it was held that an expired entry certificate could not entitle the holder to appeal against the refusal to enter while in the U.K.
299. H.C. 79 (1973) para. 26 and H.C. 80 (1973) para. 24.
300. H.C. 80 (1973) para. 19 and H.C. 82 (1973) para. 17.
301. MUNASINGHE v HOME SECRETARY [1975] Imm. A.R. 79 p. 81.
302. *ibid.*, p. 82.
303. H. LAVENDER AND SON LTD. v MINISTER OF HOUSING AND LOCAL GOVERNMENT [1970] 3 All.E.R. 871.
304. People who come under the work-permit scheme include executives and professionals, craftsmen etc.. They are detailed in Department of Employment Leaflet DW5.
305. There is nothing to stop people who came in a temporary capacity from applying to remain in another temporary capacity.
306. The word "normal" in the Rules means "in the normal way or usually"; TALLY v HOME SECRETARY [1975] Imm. A.R. 83.

307. HOME SECRETARY v MOUSSA [1976] Imm. A.R. 78.
308. TALLY v HOME SECRETARY [1975] Imm. A.R. 83.
309. HOME SECRETARY v STILLWAGGON [1975] Imm. A.R. 132 p. 137.
310. HOME SECRETARY v MOUSSA [1976] Imm. A.R. 78.
311. H.C. 80 (1973) para. 5 and H.C. 82 (1973) para. 5.
312. H.C. 80 (1973) para. 19 and H.C. 82 (1973) para. 17.
313. CHULVI v HOME SECRETARY [1976] Imm. A.R. 133.
314. H.C. 80 (1973) para. 20 and H.C. 82 (1973) para. 18.
315. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 33.
316. H.C. 79 (1973) para. 31 and H.C. 81 (1973) para. 27.
317. H.C. 79 (1973) para. 32 and H.C. 81 (1973) para. 28.
318. New Law Journal 1975, vol. 125, p. 849.
319. H.C. 80 (1973) para. 21 and H.C. 82 (1973) para. 19.
320. Visa nationals must have an entry clearance before they can be admitted.
321. H.C. 79 (1973) para. 32 and H.C. 81 (1973) para. 28.
322. H.C. 79 (1973) para. 33 and H.C. 81 (1973) para. 29.
323. H.C. 79 (1973) para. 34 and H.C. 81 (1973) para. 30.
324. TH/4148/74 (473) unreported.
325. Cmnd. 4295 para. 22.
326. HOME SECRETARY v TALLY [1972] Imm. A.R. 258.
327. PAREKH v HOME SECRETARY [1976] Imm. A.R. 84.
328. H.C. 79 (1973) para. 34 and H.C. 81 (1973) para. 30.
329. HOME SECRETARY v MARTIN (J.B.S.) [1972] Imm. A.R. 146.
330. *ibid.*, - money brought from other sources to maintain the standard of living of the proprietor is not taken into account for the purpose of assessing the sufficiency of funds in an established form.
331. HOME SECRETARY v MARTIN (J.B.S.) [1972] Imm. A.R. 146 and HOME SECRETARY v STAWCZYKOWSKA [1972] Imm. A.R. 220.
332. HOME SECRETARY v STAWCZYKOWSKA [1972] Imm. A.R. 220.

333. PAREKH v HOME SECRETARY [1976] Imm. A.R. 84.
334. H.C. 80 (1973) para. 4 and H.C. 82 (1973) para. 4 - a person's conduct is a relevant fact when considering his extension of leave to stay.
335. HOME SECRETARY v PATEL [1975] Imm. A.R. 95.
336. H.C. 79 (1973) para. 33 and H.C. 81 (1973) para. 29.
337. [1972] Imm. A.R. 154.
338. HARPALANI v HOME SECRETARY 1025/71 unreported.
339. HOME SECRETARY v STAWCZYKOWSKA [1972] Imm. A.R. 220.
340. H.C. 81 (1973) para. 56.
341. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 36.
342. H.C. 80 (1973) para. 21 and H.C. 82 (1973) para. 19.
343. H.C. 79 (1973) para. 35 and H.C. 81 (1973) para. 32.
344. *ibid.*
345. *ibid.*
346. [1972] Imm. A.R. 158.
347. [1975] Imm. A.R. 72.
348. E.CO., CANBERRA v. WARD [1975] Imm. A.R. 129.
349. R. v HOME SECRETARY, EX PARTE KOPALA 1484/72 (34) unreported.
350. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 33.
351. H.C. 80 (1973) para. 21 and H.C. 82 (1973) para. 19.
352. H.C. 81 (1973) para. 56.
353. H.C. 79 (1973) para. 36 and H.C. 81 (1973) para. 32.
354. *ibid.*
355. HOME SECRETARY v STILLWAGGON [1975] Imm. A.R. 132.
356. DIAS v HOME SECRETARY [1976] Imm. A.R. 126.
357. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 33.
358. H.C. 80 (1973) para. 21 and H.C. 82 (1973) para. 19.
359. H.C. 81 (1973) para. 56.
360. H.C. 79 (1973) para. 37 and H.C. 81 (1973) para. 33.

361. H.C. 79 (1973) para. 38.
362. SHAH (S.D.L.) v HOME SECRETARY [1972] Imm. A.R. 56.
363. *ibid.*, and H.C. 79 (1973) para. 38.
364. R. Moore and T. Wallace p. 49,
365. H.C. 79 (1973) para. 4.
366. R. v HOME SECRETARY, EX PARTE BHUROSAN [1968] 1 Q.B. 226 and MAMALAS v HOME SECRETARY [1972] Imm. A.R. 11; and CHENG v HOME SECRETARY [1972] Imm. A.R. 5.
367. H.C. 79 (1973) para. 5 and I. Macdonald p. 37.
368. *ibid.*
369. HOME SECRETARY v LAKDAWALLA [1972] Imm. A.R. 26.p. 31.
370. H.C. 79 (1973) para. 12 ff.
371. H.C. 79 (1973) para. 39 and H.C. 81 (1973) para. 34.
372. *ibid.*
373. H.C. 79 (1973) para. 40 and H.C. 81 (1973) para. 35 and R. v HOME SECRETARY, EX PARTE SAFIRA BEGUM, The Times, May 28, 1976 Q.B.D.
374. H.C. 79 (1973) para. 41 and H.C. 81 (1973) para. 36.
375. H.C. 79 (1973) para. 42 and H.C. 81 (1973) para. 37.
376. New Law Journal, 1975, vol. 125, p. 897 - reference therein to DILJAR BEGUM 682/73 (461) unreported.
377. R. Moore and T. Wallace p. 37.
378. IQBAL v HOME SECRETARY 2418/71 (131) unreported.
379. [1972] Imm. A.R. 45.
380. ISHIODU v E.C.O., LAGOS [1975] Imm. A.R. 56.
381. NAZIR BEGUM v E.C.O., ISLAMABAD [1976] Imm. A.R. 31.
382. HESSING v HOME SECRETARY [1972] Imm. A.R. 134.
383. *ibid.*, p. 136.
384. MANEZA BI 1403/73 (100) unreported.
385. New Law Journal 1975, vol. 125, 897 at p. 898.
386. *ibid.*

387. *ibid.*
388. H.C. 79 (1973) para. 43 and H.C. 81 (1973) para. 38.
389. H.C. 79 (1973) para. 39.
390. H.C. 79 (1973) para. 44 and H.C. 81 (1973) para. 39.
391. AFTAB MIAH v HOME SECRETARY [1972] Imm. A.R. 185.
392. IQBAL HAQUE v E.C.O., DACCA [1974] Imm. A.R. 51.
393. PINNOCK v E.C.O., KINGSTON JAMAICA [1974] Imm. A.R. 22.
394. MCGILLIVARY v HOME SECRETARY [1972] Imm. A.R. 63.
395. HOME SECRETARY v SOMERZAUL [1972] Imm. A.R. 101.
396. *ibid.*, p. 103.
397. *ibid.*
398. E.C.O., MADRAS v MADARAJAN [1976] Imm. A.R. 144.
399. MCGILLIVARY v HOME SECRETARY [1972] Imm. A.R. 63.
400. *ibid.*
401. EMMANUEL v HOME SECRETARY and MARTIN v HOME SECRETARY [1972] Imm. A.R. 63.
402. *ibid.*
403. EUGENE v E.C.O., BRIDGETOWN [1975] Imm. A.R. 111. cf HOME SECRETARY v PUSEY [1972] Imm. A.R. 240.
404. BOVELL v E.C.O., GEORGETOWN, GUYANA [1973] Imm. A.R. 37.
405. HOWARD v HOME SECRETARY [1972] Imm. A.R. 93.
406. HOME SECRETARY v CAMPBELL [1972] Imm. A.R. 115.
407. *ibid.*
408. HOWARD v HOME SECRETARY [1972] Imm. A.R. 93 and NEEDHAM v E.C.O., KINGSTON, JAMAICA [1973] Imm. A.R. 75.
409. E.C.O., KINGSTON, v HOLMES [1975] Imm. A.R. 20.
410. *ibid.*, p. 23. cf. WILLIAMS v HOME SECRETARY [1972] Imm. A.R. 207 where it was held that a mother's skin disease was not a ground making exclusion undesirable.
411. LEE v HOME SECRETARY 233/72 (44) unreported.
412. MCGILLIVARY v HOME SECRETARY [1972] Imm. A.R. 63.

413. MANZAR ALAM v E.C.O., LAHORE [1973] Imm. A.R. 79.
414. Cf., HOME SECRETARY v SOMERZAUL [1972] Imm. A.R. 101.
415. MALIK v HOME SECRETARY [1972] Imm. A.R. 37.
416. RAFIQ v HOME SECRETARY [1972] Imm. A.R. 167.
417. BROWN v E.C.O., KINGSTON [1976] Imm. A.R. 119; and B. SINGH v E.C.O., NEW DELHI [1975] Imm. A.R. 34.
418. B. SINGH v E.C.O., NEW DELHI [1975] Imm. A.R. 34.
419. *ibid.*
420. [1975] Imm. A.R. 49.
421. Immigration Act 1971, ss. 4, 5, 7 and 11.
422. Mulla p. 927.
423. RAVAT v E.C.O., BOMBAY [1974] Imm. A.R. 79.
424. E.C.O., MADRAS v MADARAJAN, [1976] Imm. A.R. 144.
425. T. SINGH v HOME SECRETARY [1972] Imm. A.R. 265.
426. [1976] Imm. A.R. 7 and NETHLINE WHITE v E.C.O., KINGSTON TH/242/74 (380) unreported.
427. CUFFY v E.C.O., GEORGETOWN [1976] Imm. A.R. 66.
428. E.C.O., MADRAS v NADARAJAN [1976] Imm. A.R. 144 and BROWN v E.C.O., KINGSTON [1976] Imm. A.R. 119.
429. BROWN v E.C.O., KINGSTON [1976] Imm. A.R. 119 - Tribunal's ruling.
430. SHAH v HOME SECRETARY TH/2321/73 unreported.
431. Immigration Act 1971, s.13(2).
432. BROWN v E.C.O., KINGSTON [1976] Imm. A.R. 119 p. 124.
433. H.C. 79 (1973) para. 45 and H.C. 81 (1973) para. 40.
434. *ibid.*
435. H.C. 79 (1973) para. 40 and H.C. 81 (1973) para. 35.
436. [1973] Imm. A.R. 41.
437. H.C. 80 (1973) para. 28 and H.C. 82 (1973) para. 26.
438. FRANCIS v HOME SECRETARY [1972] Imm. A.R. 162 p. 167.
439. E.C.O., LAHORE v ABDULLAH [1973] Imm. A.R. 57.

440. *ibid.*, p. 62.
441. E.C.O., BOMBAY v SEEDAT [1975] Imm. A.R. 121.
442. E.C.O., NEW DELHI v IND KAUR BAIDWAN and I. SINGH v E.C.O., NEW DELHI [1975] Imm. A.R. 126.
443. E.C.O., BOMBAY v SEEDAT [1975] Imm. A.R. 121.
444. E.C.O., NEW DELHI v I.K. BAIDWAN and I. SINGH v E.C.O. NEW DELHI [1975] Imm. A.R. 126.
445. MOHAMMED ZAWAN v E.C.O., LAHORE [1973] Imm. A.R. 71 p. 75.
446. *ibid.*
447. E.C.O., BOMBAY v SEEDAT [1975] Imm. A.R. 121.
448. MOHAMMED ZAWAN v E.C.O., LAHORE [1973] Imm. A.R. 71 is still relevant to the present Rules although it was decided under the old Rules.
449. E.C.O., LAHORE v ABDULLAH [1973] Imm. A.R. 57.
450. E.C.O., BOMBAY v THAKERAR [1974] Imm. A.R. 60.
451. [1973] Imm. A.R. 47.
452. *ibid.*, p. 50.
453. Cmnd. 4298 para. 43 and HOME SECRETARY v PATEL [1972] Imm. A.R. 227.
454. [1955] 2 Q.B. 479 and C. (AN INFANT) v E.C.O., HONG KONG [1976] Imm. A.R. 165.
455. H.C. 79 (1973) para. 46 and H.C. 81 (1973) para. 41.
456. *ibid.*
457. H.C. 79 (1973) para. 40 and H.C. 81 (1973) para. 35.
458. [1975] Imm. A.R. 42.
459. *ibid.*, p. 48.
460. *ibid.*, p. 45.
461. Cmnd. 5715 para. 47 and Cmnd. 5717 para. 2.
462. *ibid.*
463. *ibid.*
464. H.C. 79 (1973) para. 47 and H.C. 81 (1973) para. 42.
465. J.M. Evans p. 64.

466. E.E.C. Treaty, Article 10, Directive 1612/28.
467. Cmnd. Papers 5715-5718 (1974).
468. Hansard No. 1068, March 24, 1977 paras. 476-77 and H.C. Papers 238-241, March 24, 1977;
469. He will be inadmissible if he has employed false representations or if he is subject to a deportation order, etc.
470. The Times, March 23, 1977. The Rules have now been amended.
471. [1955] 2 All E.R. 614.
472. Cf., H. v H. [1953] 2 All E.R. 1229.
473. [1977] S.L.T. 17.
474. Cmnd. 5715 para. 49 and Cmnd. 5717 para. 44.
475. H.C. 79 (1973) para. 50 and H.C. 81 (1973) para. 45.
476. *ibid.*
477. Immigration Act 1971, s.1(2).
478. H.C. 79 (1973) para. 51 and H.C. 81 (1973) para. 46.
479. Immigration Act 1971, s.1(2) and (5).
480. H.C. 79 (1973) para. 51. The requirements for settlement and the 2 years residence are not severable - T. KHAN v E.C.O., DACCA [1974] Imm. A.R. 55.
481. [1973] 3 All E.R. 796 (C.A.).
482. [1970] 3 All E.R. 97 (H.L.).
483. R. v HOME SECRETARY, EX PARTE MUGHAL [1973] 3 All E.R. 796 and Immigration Act 1971, s.3(8).
484. In practise children under the age of 18 will be admitted - New Law Journal, 1975, vol. 125, p. 1014.
485. H.C. 79 (1973) para. 39.
486. New Law Journal, 1975, vol.125, p. 1014.
487. The Times, May 12, 1976.
488. H.C. 79 (1973) paras. 51-52 and H.C. 81 (1973) paras. 46-47.
489. H.C. 79 (1973) paras. 39-41 and H.C. 81 (1973) paras. 34-39.
490. H.C. 79 (1973) paras. 58-63 and H.C. 81 (1973) paras. 60-65.
491. BASHIR v THE IMMIGRATION OFFICER, DOVER [1976] Imm. A.R. 96.

- 492. *ibid.*
- 493. [1975] Imm. A.R. 1.
- 494. Cmnd. 4298 para. 48 under which the case was decided was in para materia with the present Rules.
- 495. CF. T. KHAN v E.C.O., DACCA [1974] Imm. A.R. 55 where lack of close connection with the U.K. and stay out of the U.K. for more than 2 years sufficed to show that K. was not ordinarily resident in the U.K. and couldn't be admitted as a returning resident.
- 496. [1974] Imm. A.R. 69.
- 497. *ibid.*, p. 74.
- 498. R. v GOVERNOR OF PENTONVILLE PRISON, EX PARTE AZAM [1973] 2 All E.R. 741.
- 499. HOME SECRETARY v B. SHEIKH [1972] Imm. A.R. 143.
- 500. FRANCIS v HOME SECRETARY [1972] Imm. A.R. 162.
- 501. New Law Journal, 1975, vol. 125, p. 1015.
- 502. H.C. 79 (1973) para. 53 and H.C. 81 (1973) para. 48.
- 503. T. KHAN v E.C.O., DACCA, [1974] Imm. A.R. 55.

CHAPTER FOUR

KENYA

Under the Immigration Act of Kenya¹ non-citizens of Kenya² wishing to enter the country must, in general, be in possession of Entry Permits or Passes. There are thirteen classes of entry permits which are by their very nature work permits, and eight classes of passes. A holder of a pass cannot except in one case³ be allowed to take or seek employment or to engage in any business, occupation, profession or trade. Non-citizens who hold resident's certificates and certificates of exemption need not have an entry permit or pass in order to enter Kenya or to engage in any specified occupation, business, profession or trade or in order to seek or take a specified employment. Holders of residents' certificates and certificates of exemption are an anomalous category and will be dealt with separately.

Visas: In general nationals of most countries are required to have visas before proceeding to Kenya if they are seeking to come as holders of passes.⁴ There are two kinds of visas, that is, referrable and non-referrable. Whether a visa is referrable or non-referrable depends on the existing agreement between the Kenyan Government and any country whose nationals are required to have visas prior to their departure for Kenya. For this reason one must always check for any changes of the type of visa he is required to have before leaving for Kenya. This is extremely important because a person who is required to have a referrable visa must have one before arriving in Kenya. If he does not do that he will be automatically deported from Kenya on landing or on entry if he is coming by ship, train or by road. A person who is required to have a non-referrable visa, on the other hand, will not be automatically deported on arrival. He will be issued with a visa at a port of entry if he offers satisfactory reasons why he did not obtain it before starting the journey. If he has no satisfactory reasons

he will also be deported. In either case a person who was required to have a non-referrable visa and arrives without one will be, of necessity, subjected to delay.⁵

Mere possession of a visa is not sufficient to entitle a person who is required to have one for the issue of a pass. The visa must be valid at the time of the arrival of the passenger at a port of entry; this means the visa must not have expired by effluxion of time. A visa need not be given for any specific purpose like in the U.K. The reason for this is that a work permit or pass which is issued on entry is the legal permit which describes the purpose for which a person is admitted. This does not mean that an applicant for a visa is not required to give any reason for wishing to go to Kenya. He must do so, but unlike the U.K., he cannot be refused entry merely because due to a change of circumstances he cannot claim entry into the country for the original purposes. In other words, a visa need not be limited to the purpose of entry at the time of entry as in the U.K. It is only limited as to the time of entry; it is important for the purpose of entry but has nothing to do with the number of entries that may be made before it expires since that role is taken by passes, which will be looked at shortly.

A visa which is obtained by or was issued in consequence of fraud or misrepresentation, or the concealment or non-disclosure, whether intentional or inadvertent, of any material fact or circumstance shall be and be deemed always to have been void and of no effect.⁶ The effect of this provision is that a person who was allowed entry into Kenya because of any of his false representations or non-disclosure of facts when applying for a visa or a pass or an entry permit will be deemed to have entered into Kenya illegally since the written authority permitting the entry is ipso facto void whether the representations or non-disclosure of material facts were made intentionally or inadvertently.⁷ If the representations or non-disclosure of the material

facts were made fraudulently or knowingly and the person knew or had reasonable cause to believe the representations to be false or misleading then the person is guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and such imprisonment, and for this purpose it does not matter whether the false representations were made in Kenya or outside Kenya.⁸

It must be noted at once that whereas an inadvertent supply of false information or omission of material facts invalidates a visa and whereas the person's entry into Kenya thereby becomes unlawful, such an inadvertent supply of false information or omission of material facts does not probably give rise to the offence described above. For a person to be subject to prosecution as above a clear intent or recklessness or negligence may be proved.

Passports: All non-citizens wishing to enter Kenya must be in possession of valid passports or some other valid travel document or documents of identity.⁹ A holder of a passport or travel document or document of identity means the person to whom such passport or such document is lawfully granted or given by any authority recognised by the Government of Kenya¹⁰ and "... any other person to or in respect of whom the same applies in addition to the (principal) holder in like manner ... whether by reasons of the terms thereof or by reason of any duly authorised endorsement or extension thereof."¹¹

A holder of a passport or a document therefore includes dependants whose names are duly endorsed on any such document or passport or who are therein described. It must be emphasised that the requirement for possession of a passport or documents of travel or identity apply equally to non-citizens seeking entry into Kenya as to holders of exemption certificates.

Return Tickets: In addition to the above requirements a pass holder is, in appropriate cases, required to be in possession of a valid return ticket to his/her country of origin or valid onward tickets to countries of acceptance.¹² This is a particularly important requirement for people who want Visitors' Passes. Failure to comply with it in the case of visitors may lead to a refusal of entry into Kenya. It is also required of British passport holders of Pakistan, Indian and Bangladesh origin to produce four thousand shillings or its equivalent on arrival as visitors otherwise they will be refused entry and returned from whence they came forthwith.¹³

Prohibited Immigrants: No non-citizen will be admissible into Kenya if he is a prohibited immigrant notwithstanding that he is in possession of a valid passport or a valid document or any other valid written authority,¹⁴ except in very limited cases where he may be allowed to enter Kenya and remain therein temporarily for such period and subject to such conditions as the immigration officer may in his discretion determine.¹⁵ The following categories of people are prohibited immigrants:

- (i) a person who is incapable of supporting himself and his dependants (if any) in Kenya; or is
- (ii) a mental defective or a person suffering from mental disorder; or
- (iii) who (a) refuses to submit to examination by a medical practitioner after being so required by an immigration officer; or
 - (b) is certified by a medical practitioner to be suffering from a disease which makes his presence in Kenya undesirable for medical reasons;
- (iv) a person who, not having received a free pardon has been convicted in any country, including Kenya, of murder or of any offence for which a sentence of imprisonment has been passed for any term and who by reason of such conviction is considered by the Minister to be an undesirable immigrant;
- (v) a prostitute, or a person living on or receiving or who before entering Kenya lived on or received the proceeds of prostitution;
- (vi) a person who in consequence of information received from any government or from any other source considered by the Minister to be reliable, is considered by the Minister to be an undesirable immigrant;

- (vii) a person or a member of a class of persons, whose presence in Kenya is declared by the Minister to be contrary to the national interests;
- (viii) a person who, upon entering or seeking to enter Kenya, fails to produce a valid passport to an immigration officer on demand or within such time as that officer gives,
- (ix) a person who was, immediately before the commencement of the Immigration Act 1967, was a prohibited immigrant by virtue of the old laws;
- (x) a person whose presence in or entry into Kenya is unlawful under any other written law;
- (xi) a person in respect of whom there is in force a deportation order made or deemed to be made under the Immigration Act 1967 or previous laws; and
- (xii) a dependant of any of the persons mentioned in the foregoing paragraphs.¹⁶

The above grounds of inadmissibility are the only ones that may be taken into account. They are similar in scope to the grounds on which in the U.K. a person may be refused entry if he is a non-E.E.C. non-patrial. Both share one thing in common. When the Minister is considering whether the entry of a person into the country is desirable or not for the public good or national interests, as the Kenyan Act terms it, there are few things that cannot fall within them. However, whereas in the U.K. one can in certain circumstances appeal against refusal of entry for reasons of public good, in Kenya the Minister's decision that the entry of a person into the country is against national interests is simply final.¹⁷

Deposits: There is a further restriction on non-citizens wishing to enter Kenya and that restriction is exercisable at the option of an immigration officer. As a condition precedent to the issue of an entry permit or pass an immigration officer may, in his discretion, require a sum not exceeding five thousand shillings or its equivalent to be deposited with him in respect of each entry permit or pass.¹⁸ In lieu of the money to be deposited the

the immigration officer may require the person or persons to enter into a bond to provide security with or without sureties for a sum not exceeding the amount of money stated above in respect of each entry permit or pass given.¹⁹ In the alternative an employer of entry permit holders may be allowed, in the discretion of the immigration officer, to enter into a covenant to provide general security in respect of such entry permit holders and, their wives, children under the age of 18 years²⁰ and any other dependants in the sum not exceeding five thousand shillings or its equivalent for each individual.²¹ Immigration officers have the discretion to accept securities of an alternative nature.²²

The purpose of such securities is, broadly speaking, for use in defraying any expenses incurred or likely to be incurred by the Government of Kenya in connection with the detention, maintenance, medical treatment or removal from Kenya of the person in respect of whom the entry permit or pass was issued and his wife, children and other dependants, if any.²³

Kenya is not a welfare state in the sense or to the extent that the U.K. and other European countries are. If it were to assume the financing of the responsibilities mentioned above it would, in effect, be a welfare state for non-citizens and at the expense of the citizens. That would not be tolerated politically and even economically. For these reasons it is perhaps justifiable to demand the paid securities where it is thought by immigration authorities to be desirable. However, when exercising their discretion immigration officers must be wary not to use it as a punitive measure against passengers. That is not what it is intended for. It is a form of social security or insurance for the benefit of passengers when any of the above situations do arise and in this regard they (immigration authorities) are "trustees" of the money.

The deposit becomes refundable to the passengers when the immigration officer is satisfied that

- (a) the person in respect of whom the deposit was made and his wife and children and other dependants, if any, have left or are leaving Kenya; or
- (b) the person in respect of whom the deposit was made and his wife and children and other dependants, if any, are all dead; or
- (c) the retention of the deposit is for any other reason no longer necessary.²⁴

Every security bond is to remain in force unless and until any of the three things takes place.²⁵

If a security bond or a general security covenant is forfeited before any of the above three things take place then an immigration officer will make an application in a Magistrate's Court for an issue of a warrant of attachment and sale of the moveable property belonging to any person bound by such security to pay the sum specified in the bond or covenant.²⁶ If that person died after the security was forfeited then an immigration officer will apply for a warrant of attachment and sale of the person's estate.²⁷

All orders made under this regulation are appealable and may be reversed by the High Court.²⁸

This is an important innovation in an area that otherwise operates in the realms of discretion. It is submitted, however, that a person against whose property a warrant of attachment and sale is issued has in any case a right of appeal to the High Court under the Kenyan Constitution which guards against deprivation of property.²⁹

It must be remembered that a bond or covenant of security even when forfeited does not constitute a contract since the essential elements of a contract are palpably lacking. In that case the requirement of ~~having~~ executing the covenant or bond is in reality a statutory requirement, and it also being a statutory provision that the forfeiture of such a covenant or bond entitles a Court to issue a warrant of attachment and sale, it follows automatically

that the provisions of the constitution in respect of property are attracted for the purpose of determining whether or not it is legal to so attach the property. This is important from another point of view. If there was no right of appeal to the High Court it would be open to argue that the Government is using the Magistrates courts as a means of legitimising the attachment and sale of a person's property which they cannot do directly under the constitution.

When a passenger produces a ticket or passage order in respect of a passage to a destination outside Kenya that he will be leaving Kenya permanently, the immigration officer will stamp the ticket or passage order with a non-refund endorsement and if a deposit had been made the whole amount or the balance thereof shall be refunded to the passenger.³⁰ It is an offence to cancel or vary the ticket or passage order after it has been so endorsed without first getting the permission of an immigration officer.³¹

Pass Holders

Pass holders are, loosely speaking, people who are coming to Kenya for temporary purposes. Strictly speaking however, all people who come into Kenya as pass holders are in a category that is not allowed to take employment, engage in any business, trade, profession or occupation. There are eight classes of passes, that is; a pupil's pass, a visitor's pass, a dependant's pass; an intransit pass, and interstate pass, a prohibited immigrant's pass, a special pass and a re-entry pass.

Before a passenger is issued with a pass he must have complied with any prior conditions he may have been subject to. For example, if a person who is required to have a referrable visa before his departure for Kenya arrives without one he will not be given a pass of any kind. On the contrary he will be deported forthwith. Where a person has complied with the immigration requirements he is eligible for entry and he may be given any one of the passes specified above depending

It must be mentioned that the issue of a pass is at the discretion of the immigration officer. If he exercises his discretion in favour of issuing a pass he has further discretion to issue it subject to such conditions as he may specify.³² He may also cancel any pass or vary any term or condition thereof at any time.³³ The grounds upon which an immigration officer may exercise his discretion are those of policy and expediency as intimated by the Minister for Home Affairs from time to time.³⁴

An immigration officer has no power to issue any pass until and unless a fee in respect of the pass sought by the passenger has been paid.³⁵ Passes are generally issued on arrival at the port of entry into Kenya.

Each pass will now be examined.

(1) A Pupil's Pass

A person seeking to enter Kenya for the purposes of receiving education or training in an educational or training establishment within Kenya by which he has been accepted as a pupil may be issued with a pupil's pass. A parent or guardian may, alternatively, make an application for such a pass to the immigration officer,³⁶ presumably where the child is under the age of 18 years. An immigration officer will issue a Pupil's pass if he is satisfied that the pupil has been accepted as such by an approved institution of education or training, that there is adequate accommodation for the pupil at the institution and that the issue of the pass will not deprive a suitable citizen of Kenya of that accommodation.³⁷

There is in Kenya a list of approved educational or training establishments which is normally obtainable from the Ministry of Education. This contrasts with the U.K. where there is no list of approved institutions with the consequence that a student may be refused entry into the country to study in an established educational or training institution merely because the immigration authorities do not consider the institution good or following an haphazard policy decision as in SCHMIDT v HOME OFFICE [1969] 1 W.L.R. 338.

Although an immigration officer has a discretion to issue a pupil's pass, it is submitted that unless the pupil is inadmissible because he is a prohibited immigrant, then the immigration officer's discretion will be limited to the three issues, i.e. whether the pupil has been accepted by an approved institution, whether there is adequate accommodation and whether or not it will deprive a suitable citizen of Kenya of that accommodation. In the U.K. the range of grounds that an immigration officer may take into account is very extensive.

Subject to any conditions specified in a Pupil's pass the holder thereof shall be entitled to enter Kenya within the period stated below and to remain in Kenya for such period from the date of his entry as may be specified therein. He will be free during the period he is allowed to remain in Kenya to re-enter the country freely from Tanzania or Uganda.³⁸ It would appear that the period for which the holder of a Pupil's pass is allowed to remain in Kenya is the length of his study³⁹ and this clearly contrasts with the U.K. practise where leave to remain must be renewed every 12 months, and in some cases for a shorter time.

If the holder of a Pupil's pass fails, within 30 days from the date of issue of such pass or from the date of the holder's entry into Kenya, whichever is the later, to enter as a pupil at the educational or training establishment in respect of which the pass was issued, or having entered such an establishment at any time thereafter leaves or ceases to be retained as a pupil in the establishment, then with effect from the expiration of the 30 days, or, as the case may be, from the date on which he leaves or ceases to be a pupil at the establishment his pass shall be deemed to have expired and to be of no further validity or effect.⁴⁰ In that instance his further stay in Kenya is unlawful. However, it was noted that immigration officers have power to vary the terms and conditions of a pass. In the case of the holder of a Pupil's pass the power to vary the terms and conditions of such pass would appear to be exercisable before the expiry of the pass through any of the above occurrences. If it were otherwise then immigration

officers would clearly be exercising a discretion which has the effect of "reviving" or "redeeming" a pass which is invalid and of no effect in law. That is clearly not contemplated or provided for in the Immigration Act 1967. The corollary of the submission is that, if the holder of a Pupil's pass wishes to have his terms and conditions varied, then an application to the immigration officer requesting for a variation of the terms and conditions before the pass expires through any of the above occurrences is necessary. This is true of U.K. also.

A Pupil's pass is limited to the institution or establishment at which the holder thereof is accepted. He cannot, therefore, join a different institution or establishment for study or training on the basis of a pass that was given in respect of another institution or establishment. He can only do that on his pass being accordingly varied by an immigration officer as stated above. This again contrasts with the U.K. law where a person seeking entry for the purpose of study may be admitted as a student with no limitation to his studying in a particular institution. Although on the face of it a student can transfer from one institution to another the U.K. immigration authorities do not look kindly at it and it can in fact lead to very unpleasant consequences. For example if the change from one institution to another involves a change of the type of studies to be undertaken, then it forms a basis for a new application of an entry clearance. The Kenyan law achieves this by simply providing a pass that restricts a person to a particular institution. A change of courses in that institution does not constitute a ground for invalidating the pass although it might do under the U.K. law.

Finally, any person being in charge of an educational or training establishment who allows a pupil who is required to obtain a pupil's pass to attend such an establishment before such person is in possession of a pupil's pass, shall be guilty of an offence.⁴¹

"Holder" in relation to a pupil's pass means the person in respect of whom the same has been lawfully granted or issued and any other person to or in

respect of whom the same applies in addition to the holder in a like manner as to the holder, whether by reason of the terms thereof or by reason of any duly authorised endorsement or extension thereof.⁴² The effect of this definition is that the spouse of the holder of a Pupil's pass can lawfully come into and live in Kenya with the holder during the stay of the holder, provided that the name of the accompanying spouse is endorsed on the pass of the pupil. In this case the holder does not need a dependant's pass since the wives of pass holders do not qualify as dependants.⁴³ There is no discrimination on grounds of sex as in the U.K., where female students may not, apparently, be accompanied by their male spouses. There is the possibility that the immigration authorities may demand a security or securities in respect of the holder of a pass and the spouse. This will normally be an effective disincentive against the bringing of spouses by holders of Pupils' passes. It must also be noted that a spouse coming with a person who is the holder of a Pupil's pass cannot take any employment or engage in any occupation, profession, trade or business.⁴⁴ In this respect the U.K. law has a touch of humanity in that the wife of a student will not usually be prohibited from taking employment.

(2) A Visitor's Pass

A person will be given a visitor's pass on arrival at a port of entry into Kenya if he has complied with any requirements he is subject to before leaving for Kenya.⁴⁵ A visitor's pass is granted to a person who desires to enter Kenya for the purpose of a holiday or temporarily for the purpose of conducting any business, trade or profession or any other temporary purpose which an immigration officer may approve.⁴⁶ Subject to the terms and conditions ~~of~~ specified a visitor's pass entitles the holder thereof to enter Kenya within the period specified and to remain in Kenya for such period, not exceeding 6 months from the date of entry into Kenya, as may be specified.⁴⁷ During the 6 months stay the holder may re-enter Kenya from Tanzania and Uganda freely.⁴⁸ The period of stay may be extended by an immigration officer from time to time, but it shall in no case exceed one year from the

date of the holder's entry.⁴⁹ There is power for an immigration officer also to vary the terms and conditions of such a pass.⁵⁰

The holder of a visitor's pass may not accept or engage in any form of employment in Kenya, whether paid or unpaid without the prior written permission of an immigration officer and if he engages or accepted employment without such permission he will be guilty of an offence and with effect from the date of such acceptance or engagement his pass shall be deemed to have expired and to be of no further validity.⁵¹

The provisions above are basically the same as the U.K. equivalents with the exception that a visitor has no right to stay in the U.K. for employment. A visitor could stay in the U.K. for longer than one year if he can support himself but no visitor may stay in Kenya for longer than one year in aggregate whether he supports himself or not. Besides, apart from satisfying an immigration officer that one is coming for holiday or temporarily for stated purposes, and apart from paying the security deposit if requested to, one is not supposed to prove much more as in the U.K. For example, there is no requirement that a visitor must show that he has accommodation or that he will support himself without working, which matters are crucial in the U.K.

There is no limitation on the reasons for which one may go to Kenya as a visitor. Accordingly a person would be admitted as a visitor if he is going for medical treatment or going to visit friends and relatives. The only test he must satisfy in this case is that the visit must be a temporary one.

(3) A Dependant's Pass

Any person who, being lawfully present in Kenya, or who is entitled to enter Kenya by virtue of: (a) being a citizen of Kenya or (b) having been issued with an entry permit or (c) being an exempted person or (d) being

person to whom s.4(3) of the Immigration Act 1967⁵² applies, may apply to an immigration officer for a dependant's pass.⁵³ It must be noted that the categories of people allowed to bring dependants are no narrower compared with the U.K. where citizens, settled people and work permit holders are allowed to bring their dependants. The important point of comparison is that the concept of a dependant is wider in Kenya than in the U.K. A dependant, in the case of Kenya, is a person who is by reason of age, disability or any incapacity unable to maintain himself adequately or for some other reason relies upon the applicant for his maintenance.⁵⁴ The only problem is that there are no standard tests of things like age, disability or incapacity or inability to maintain oneself adequately. This is something the appeals system under the U.K. immigration law is helping to develop and it must indeed be regretted that there is no way in which standard tests may be developed under the Kenyan system.

Another significant point of comparison is that under the Kenyan system it is the person who wants to bring his dependants into the country that applies for a dependant's pass⁵⁵ whereas in the U.K. a person wishing to go into the country as a dependant must make an application on his own behalf and appear for interview personally.

As in the U.K., an applicant who wants to have his dependants to be admitted into Kenya as such must show that he has an income sufficient to enable him to maintain and continue to maintain them,⁵⁶ presumably during their stay in Kenya. Thus a dependant's pass is not issued to the dependant but to the person who applies for it.⁵⁷ Normally the immigration officer will, in the case of the wife and children, endorse their dependency on the entry permit of the holder if he has one.⁵⁸ But this is entirely at the discretion of the immigration officer.

A dependant's pass shall, subject to the terms and conditions specified therein, entitle the dependant in respect of whom it is issued to

enter Kenya within the period specified therein and to remain in the country thereafter during the validity of the pass.⁵⁹ A dependant's pass lapses immediately on the dependant being no longer dependent on the applicant or if the applicant fails or is unable to maintain the dependant or if the applicant leaves Kenya in circumstances which raise a reasonable presumption that his absence will be other than temporary, or if the dependant engages in employment, or if the applicant dies.⁶⁰ When a dependant's pass lapses it is deemed to have expired and to be of no further validity.

A dependant's pass issued in respect of a woman living with her husband will not be invalid by virtue of any occurrence of the above stated grounds if she is offered or is doing a specific employment with a specific employer which is of benefit to Kenya. A dependant's pass issued to such a woman is of full effect for the unexpired time of its validity notwithstanding that she engages in such employment or has ceased to engage in such employment.⁶¹ It must be noted that the effect of this provision is that such a wife remains in Kenya on the authority of her dependant's pass and on her entry permit⁶² as well.

The possession of a dependant's pass does not entitle the person in respect of whom it is issued to re-enter Kenya from Tanzania or Uganda without further or other authority. Moreover since it is possible to bring one's husband to Kenya as a dependant, where the wife is the principal applicant it does not appear that the man enjoys the same benefits as a wife where the husband is the principal applicant. Thus it is not stated that where the wife (being the principal applicant of a dependant's pass) dies or fails to maintain the husband, or the wife leaves Kenya in circumstances which raise reasonable presumption that her absence will be other than temporary, or the husband engages in employment the husband's dependant's pass will be valid notwithstanding the occurrence of any of any of the above if he has an entry permit of Class D; i.e. he has a specific employment from a specific employer and his presence will be of benefit to Kenya. In this respect the provisions

of the Regulations made under the Immigration Act 1967 are sexually discriminatory.

The immigration officers will normally require securities for dependants as noted above.

(4) An In-Transit Pass

An in-transit pass is given to people who wish to enter Kenya for the purpose of travelling to a destination outside the country. Before it is granted an immigration officer must be satisfied that the applicant is travelling to a destination outside Kenya, is in possession of such valid documents as may be required to permit him to enter that other country and is otherwise qualified under the law in force of the country of destination to enter into it.⁶³ Thus a person asking for an in-transit pass would be refused such a pass if he had all documents to enable him to show that he was travelling to the U.K. but if he was at the same time subject to a U.K. deportation order.

An in-transit pass is endorsed in the holder's passport and is valid only for a maximum of 7 days.⁶⁴ This contrasts rather sharply with the U.K. where a passenger in transit can be given for up to 6 months to remain in the country.

(5) An Inter-State Pass

An inter-state pass is given to a person lawfully present in Kenya and who by reason of his profession, business or employment or other calling, is required to make frequent visits to Tanzania or Uganda.⁶⁵ In other words an inter-state pass is valid for re-entry into Kenya if the re-entry is either from Tanzania or from Uganda. An application must be made for an inter-state pass.⁶⁶

An inter-state pass entitles the holder thereof to re-enter Kenya from Tanzania or Uganda at any time during its validity, which is two years from the date of its issue.⁶⁷ There may be conditions attached to the pass of

course. Such an inter-state pass will not entitle the holder to re-enter Kenya as stated above if the presence in Kenya of the holder or re-entry would for any reason be unlawful.⁶⁸

Immigration officers are vested with power to extend or vary the terms and conditions of such an inter-state pass as they think fit or desirable.⁶⁹ However, in no case will the aggregate period of the validity of such an inter-state pass exceed four years from its first date of issue.⁷⁰ In the event of the pass being cancelled after its issue the holder is required to surrender it to the nearest immigration officer within seven days from the date of cancellation. Failure to do so or possession of a cancelled pass after the expiry of seven days from the date of notice automatically amounts to an offence.⁷¹

The holder of an inter-state pass includes dependants of the principal holder whose names are endorsed on the pass or included therein by description or terms.⁷²

(6) A Prohibited Immigrant's Pass

The most perplexing thing about a prohibited immigrant's pass is that there are no rules on how the power relating to the pass may be exercised. The definition of a prohibited immigrant has been given in this chapter. Apart from that all that is known is that an immigration officer may in his discretion, after an application by a prohibited immigrant,⁷³ issue a prohibited immigrant's pass to the prohibited immigrant, permitting him to enter and remain in Kenya temporarily for such period and subject to such conditions as may be specified in that pass.⁷⁴ This power is rarely exercised and when exercised it is presumably done after consultation with the Minister for Home Affairs. In that light it is probably expedient that there are no guidelines as the Minister may have to take into account the political and

individual circumstances at the time of application. In any event a lack of rules in this area means there are no standards and that justice cannot be done in some cases and if it is done it is obvious that it cannot be seen to be done.

In all other cases a prohibited immigrant who enters or intends or attempts to enter Kenya by any means whatsoever, will be served with a notice issued by an immigration officer prohibiting him from entering or requiring him to leave Kenya within the time therein specified.⁷⁵ The notice may require the prohibited immigrant to remain on the ship, aircraft, train or vehicle by which he enters or entered Kenya or it may order him to leave the country by such means and within such period as will be specified or to comply with such other requirements as to the place of residence, occupation, security or reporting to a specified authority.⁷⁶ If the person served with such a notice fails to comply with the notice he will be in breach of the law⁷⁷ unless he can prove that he has not at any time been a prohibited immigrant.⁷⁸

There is power for the Court to order, the distress of the person's moveable property and for the sale of it to defray the expenses that may have been or will be incurred by the Government of Kenya in connection with the detention, maintenance, medical treatment or removal from Kenya of such a prohibited immigrant, his wife and children and other dependants.⁷⁹ The partial recovery of any such expenses will not prejudice the liability of any surety for the balance nor will the issue or execution of such a Court order be a condition precedent for the liability of the surety.⁸⁰

An immigration officer has power to cancel any notice to a prohibited immigrant when he thinks it fit to do so. However, where he does not cancel it he may in his discretion require the carriers of the prohibited immigrant or their agents to take reasonable steps to ensure that the prohibited immigrant complies with the terms of the notice served on him. An immigration officer does that merely by issuing a copy of the notice to a prohibited immigrant to the carriers or their agents.⁸¹

(7) A Special Pass

A special pass is issued to an applicant who wants to be in Kenya for the purpose of appealing to the Minister if he has been refused an entry permit by an immigration officer, or to any applicant who wants to be in the country for the purpose of applying for an entry permit or pass or for any purpose which an immigration officer considers suitable.⁸² A person whose pass has expired or been cancelled may apply, quite properly, for a special pass to enable him to wind up his affairs in the country before leaving. A special pass may therefore be very important. It is submitted that it cannot be issued to a prohibited immigrant. The latter's recourse is to apply for a prohibited immigrants pass.

A special pass is given by an immigration officer for any period not exceeding three months⁸³ and is not under any circumstances renewable.

(8) Re-Entry Passes

Re-entry passes are issued to people who propose to leave Kenya temporarily or who have left Kenya temporarily and having been at the time of their departure lawfully present in Kenya, failed for reasons which an immigration officer is satisfied are good and sufficient, to apply for a re-entry pass before their departure.⁸⁴ Such a re-entry pass is issued to people who satisfy the immigration authorities that their presence in Kenya on re-entry will be lawful otherwise than by virtue of the re-entry pass applied for.⁸⁵ An applicant will be required therefore to be in possession of a valid entry permit or pass at the time of re-entry into the country. A person who holds a resident's certificate or a certificate of exemption does not, of course, need a re-entry pass since he falls outside the Immigration Regulations relating to passes. Moreover, holders of an inter-state pass, a pupil's pass and a visitor's pass do not need re-entry

passes since they are entitled by virtue of their passes to re-enter Kenya from Uganda or Tanzania.⁸⁶ But that is as far the exemption goes. It does not exempt any such inter-state pass holder, or such pupil's pass holder or such visitor's pass holder from the necessity of possessing a re-entry pass if re-entry into Kenya is from anywhere other than the two countries. In fact it is expressly provided that except as stated above no person is entitled to re-enter Kenya after any period of absence therefrom save under a re-entry permit or an entry permit or pass (other than a re-entry pass) issued to him since he left the country.⁸⁷ It appears that a re-entry from Tanzania and Uganda is more kindly viewed than re-entries from other countries. There is nothing in this submission to relieve the absurd situation whereby a student already in possession of a pupil's pass will not be required to have a re-entry pass when re-entering Kenya from Tanzania or Uganda whereas if he is re-entering Kenya from any other country he will be expected to have either a fresh pupil's pass or a re-entry pass. This is the case for visitors also. In this particular case it seems that the East African countries of Kenya, Tanzania and Uganda are regarded as one country or region for the purposes of immigration law.

A re-entry pass is normally endorsed in the passport of the applicant unless he left Kenya without the re-entry pass for good reasons and wishes to have one later.⁸⁸

The normal period of validity of a re-entry pass is for the expected period of absence from Kenya but will in no case exceed two years from the date of its issue.⁸⁹ The holder of a re-entry permit is entitled to re-enter Kenya from time to time during its validity. It is therefore and by far the most important document if one intends to go out of Kenya during his stay there.

Finally, it must be noted that every pass holder unless exempted by the Minister by notice in the Gazette is required to pay fees for the pass. If

If the fees remain outstanding for 90 days from the date the issue of a pass has been approved by a notification in writing, then that approval ceases automatically.⁹⁰ Further, any person who commits any offence as mentioned above is liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.⁹¹

Entry Permits

The idea of using entry permits and therefore immigration law as a strategy for economic self-sufficiency was central to the 1956 Immigration Act and the 1967 Immigration Act. Sessional Paper No. 78 of 1956 clearly stated that the future of immigration policy of the Government would be largely based on economic considerations. The 1956 Act accordingly created several classes of entry permits and passes one of which a person was required to have before he could be admitted into Kenya. The 1967 Immigration Act followed the entry permits and passes created by the 1956 Act with the "improvement" that no entry permit can confer permanent residence in Kenya on its holder.

For the above reason one soon discovers that in the 1956 Immigration Act the core issues of immigration law like settlement are of peripheral interest. There is no relationship of any kind between the absorption of the number of immigrants by the country and the system of entry permits. Neither are entry permits related to racial harmony in the country except in so far as it was felt that for purposes of stability it was necessary to remove the economic imbalances between the minority immigrant communities and the majority indigenous people. The process of these politico-economic policies became known as Africanization. Africanization was intended to be a radical policy for the transfer of the economy from the hold of the minority

immigrant communities to the majority African peoples. This is just where the system of entry permits comes in for it was sought to withdraw all the existing residents' certificates and substitute them with entry permits which would give the Minister for Home Affairs "... more power and freedom to deal with non-citizen residence and employment".⁹² The Minister now has this power and it is restricted only by economic conditions. Thus no job held by the holder of an entry permit is to be Africanised when no skilled African is available to take the job.⁹³ The Africanization policy has been and remains a gradual process and it takes proper account of the skilled manpower available in the country. However, for any person who is not a citizen of Kenya or an indigenous citizen of Uganda or Tanzania and does not rank as diplomatic personnel, to seek or take employment, or to engage in any occupation, profession, calling, business or trade in Kenya he must have an entry permit and his presence must be of benefit to Kenya, presumably in the sense that there is no Kenyan available with comparable skill to do the job. The following are the entry permits available for non-citizens wishing to work in Kenya.

(1) Class A

A person who is offered specific employment by a specific employer, is qualified to undertake that employment and whose engagement will be of benefit to Kenya;

(2) Class B

A person who is offered a specific employment by the Government of Kenya, the East African Community or any person or authority under the control of the Government or the East African Community, and whose engagement in that employment will be of benefit to Kenya;

(3) Class C

A person who is offered specific employment under an approved technical aid scheme under the United Nations Organisation or some other approved agency (not being a diplomatic personnel) and whose engagement will be of benefit to Kenya;

(4) Class D

A person who is the holder of a dependant's pass, who is offered specific employment by a specific employer, whose engagement will be of benefit to Kenya.

For an entry permit of any of the above classes to be issued, there must be proof of the employment at the time of application for the entry permit. It is no proof, of course, that one has been offered a job. An immigration officer must be further satisfied that there is no Kenyan citizen of comparable skill available to do that job. For this purpose an immigration officer must take account of the advice given by the Kenyanization Personnel Bureau, which evaluates whether jobs available or occupied by non-citizens can be taken over by Kenyans. The Bureau runs a man-power register which is used for reference of the Kenyan citizens with skills. The Bureau therefore works with the immigration department to ensure that skilled citizens are hired for any available jobs before entry permits are issued.⁹⁴

Moreover, entry permits are issued on the understanding that effective training programmes are undertaken to produce trained citizens within the time specified.⁹⁵ An applicant will therefore be refused an entry permit if the employer fails to produce such a programme to the immigration authorities. Before an entry permit is issued information must also be given to the immigration authorities on the educational, technical or professional qualifications of the applicant and his previous experience

and also the post the individual is going to hold, the staff he will supervise directly and the supervision to which he himself will be subject ~~as~~, together with the estimated value of materials or money ~~for~~ which he will be responsible for.⁹⁶ All the information is necessary for the purpose of assessing whether there are Kenyan citizens with skills to do the job and whether the training of Kenyan citizens is being undertaken.

It is now widely acknowledged that the Immigration Act has not worked well in the effective Africanization of the economy for which it was passed. During the debate on the Act it was pointed out that the Act would be abused by the process of removing "... a person from a key point that he occupies and push him ahead somewhere as a technician, and then claim that an African with that technical knowledge is not available and so keep that man."⁹⁷ This has certainly proved to be the case for a study that was undertaken in 1971 uncovered a process whereby "... changes of job titles ... (enabling) expatriate personnel to become either consultants or experts with a hike in remuneration."⁹⁸ Moreover, employers generally raise job entry requirements, exaggerate work experience, job descriptions and responsibilities as a means of arresting the Africanization programme. It is submitted that the Act leaves a lot to be desired in this particular area.

Even where Africanization has been undertaken to a great extent it is known that senior posts and key posts are not relinquished to Kenyan citizens. Colin Leys has noted, for example, that "... The Financial Director would tend to remain expatriate to protect the investment ... and two or three of the principal operations managers also tend to be expatriates, with Africans typically occupying senior posts in sales, personnel management and public relations."⁹⁹ This practice therefore prevails heavily in top management positions. A citizen will generally be categorised as a General Manager when he has no executive power; the power will be with an expatriate executive

director.

It must be noted also that evasion of the requirement to have an entry permit can be easily done by "... setting up a "regional" office in Nairobi (or any Kenyan town) whose Foreign personnel", it is claimed, "do not need entry permits because they are responsible for a much wider area of operations than Kenya alone."¹⁰⁰

Although the public service has almost been fully Africanized as a result of the efforts of the Government of Kenya through the Immigration Act, a lot remains to be done in the private sector where widespread abuses of the Immigration Act exist. The discussion above is based on the assumption that the Kenyan Immigration Act is essentially an economic measure. There are many reasons why a person may wish to emigrate to Kenya. Generally speaking there is an economic element in cases of people who come to the country voluntarily, but that does not mean that the person's desires are simply to seek employment or work. Not much account of this is taken by the Act.

(5) Class E

A person who is a member of a Missionary Society approved by the Government of Kenya and whose presence in Kenya will be of benefit to Kenya.

It must be noted straightaway that the use of the terms "a member of a Missionary Society" is a very wide one. A member includes a Minister of a church, a lay preacher, pastor, clergyman, a nun, lay brother, cantor or any ordinary member of any such missionary society. He must be coming to Kenya for the purpose of employment whether paid or unpaid. This is a very wide use of the term as other immigration laws restrict the admission of people going into a country for religious reasons to Ministers only.¹⁰¹

To be approved by the Government of Kenya a Missionary Society must be registered first in accordance with the Societies Act of Kenya.¹⁰² It

is therefore necessary for the applicant to show that he is a member of a Missionary Society that is duly registered under the Societies Act before he can become eligible for an entry permit.

(6) Class F

A person who intends to engage, whether alone or in partnership, in the business of agriculture or animal husbandry in Kenya and who

- (a) has acquired or has received all permissions that may be necessary in order to acquire an interest in land of sufficient size for the purpose; and
- (b) has in his own right and at his full and free disposition sufficient capital and other resources for the purpose, and whose engagement in that business will be of benefit to Kenya.

For any non-citizen to acquire land in Kenya for any purpose he must get the consent of the President of Kenya.¹⁰³ This is normally done through the Ministry of Lands.

Having got permission to own land it is up to the applicant to apply to the Ministry of Agriculture for consideration as to whether or not he has sufficient land in size and suitability for the purpose of agriculture and/or animal husbandry and as to whether or not he has at his full and free disposition sufficient capital and other resources for that purpose. He must also satisfy the Minister that the investment will be of benefit to Kenya. Thus a person who wants to come and farm pyrethrum might, for example, not be considered as engaging in something that will be of benefit to Kenya since pyrethrum is in good supply.

It is only when an applicant has been thus approved and when he has got or is assured of getting any licences that are required for that purpose that he becomes eligible for the entry permit. Before one applies for an entry permit most of the ground work will have been done therefore.¹⁰⁴

(7) Class G

A person who intends to engage, whether alone or in partnership, in prospecting for minerals or mining in Kenya and who,

- (a) has obtained, or is assured of obtaining, any prospecting or mining right or licence that may be necessary for the purpose; and
- (b) has in his own right and at his full and free disposition sufficient capital and other resources for the purpose, and whose engagement in that prospecting or mining will be of benefit to Kenya.

A person wishing to engage in prospecting and mining must similarly apply for permission to do so from the Ministry of Natural Resources and obtain all the necessary licences before he can be eligible for an entry permit.

(8) Class H

A person who intends to engage whether alone or in partnership, in a specific business, trade or profession (other than a prescribed profession) in Kenya and who

- (a) has obtained or is assured of obtaining, any licence, registration or other authority or permission that may be necessary for that purpose; and
- (b) has in his own right and at his full and free disposition sufficient capital and other resources for the purpose and whose engagement in that trade, business or profession will be of benefit to Kenya.

If the applicant wants to engage in business or trade he must apply to the Ministry of Commerce and Industry for the necessary permissions. Having got these permissions and any necessary licences, he then becomes eligible for the entry permit above.

(9) Class I

A person who intends to engage, whether alone or in partnership, in a specific manufacture in Kenya, and

- (a) has obtained, or is assured of obtaining any licence, registration or other authority or permission that may be necessary for that purpose; and
- (b) has in his own right and at his full and free disposition sufficient capital and other resources for the purpose, and whose engagement in that manufacture will be of benefit to Kenya.

The necessary permission will be from the Ministry of Commerce and Industry.

An applicant must also have obtained or be assured of obtaining any other licences he/she may be required to have before he/she becomes eligible for an entry permit.

(10) Class J

A member of a prescribed profession who intends to practise that profession whether alone or in partnership, in Kenya, and who

- (a) possesses the prescribed qualifications; and
- (b) has in his own right sufficient capital and other resources for the purpose, and whose practice of that profession will be of benefit to Kenya. The members of the prescribed professions are:
 - (i) Medical profession - those entitled to registration as medical practitioners under the Medical Practitioners and Dentists Act;¹⁰⁵
 - (ii) Dentists - those entitled to registration as dentists under the Medical Practitioners and Dentists Act;¹⁰⁶
 - (iii) Legal Profession - those who are advocates within the meaning of the Advocates Act;¹⁰⁷
 - (iv) Surveyors - those Land surveyors and surveyors entitled to be licenced as surveyors under the Survey Act¹⁰⁸ and those who are Fellows or Professional Associates of the Royal Institute of Chartered Surveyors respectively; included in this category are estate agents, valuers and land agents if they are fellows of the Royal Institute of Chartered Surveyors. This is a great defect in the Immigration Act because as those qualified under the Chartered Institute of Surveyors will be from the U.K. by reason that the courses are offered there.

It follows that it will be a long time before the Africanization programme is fully completed in this field. Efforts to encourage Kenyans to be members of that professional body can be easily frustrated by various administrative means of the overseas professional bodies although perhaps this is unlikely. There is therefore a case for localizing professional and other qualifications.

- (v) Pharmacists - those entitled to registration as pharmacists under the Pharmacy and Poisons Act;¹⁰⁹
- (vi) Architects and Quantity Surveyors - those entitled to registration as architects or quantity surveyors under the Architects and Quantity Surveyors Act;¹¹⁰
- (vii) Veterinary Surgeons - those entitled to registration or to be licensed as veterinary surgeons under the Veterinary Surgeons Act;¹¹¹
- (viii) Engineers - those who are members or associate members of a list of engineering institutions or hold equivalent qualifications;
- (ix) Nursing profession - those entitled to registration under the Nurses, Midwives and Health Visitors Act;¹¹²
- (x) Physiotherapists - those holding a qualification of a Chartered Society of Physiotherapy or hold an equivalent qualification;
- (xi) Accountants - those who are members or associate members of a list of accounting institutions or hold equivalent qualifications; and
- (xii) Chartered Secretaries - those who are fellows or associate fellows of the Institute of the Chartered Institute of Secretaries or the Corporation of Certified Secretaries or hold equivalent qualifications.¹¹³

It is evident that most of the professional qualifications are overseas based and more particularly U.K. based. Two things call for comment here.

Firstly, since the Immigration Act 1967 was part of the total effort to Africanize the economy it seems appropriate to comment that to have some of the professional qualifications based overseas can be a severe limitation to the speedy africanization process. Obviously the flow of professionally qualified people will be outside the control and supervision of the Kenyan Government. From experience, the flow of qualified Kenyans, depending on the overseas institutions as it does, is going to be small. To that extent Kenya is going to depend on foreign expertise for a long time to come. This

This can only be attributed to the gap or defect of the Immigration Act 1967 which favours foreign professional qualifications. Perhaps this is what Martin Shikuku M.P., meant in 1967 when the Bill was being discussed in Parliament that to retain entry permits for non-citizens would effectively "... nullify the Bill".¹¹⁴

Secondly, most of the professional qualifications are U.K. based. Perhaps this explains why the words "... or equivalent qualifications..." occur after some professional qualifications. The use of those words leaves the immigration authorities with the discretion to recognize professional qualifications from other foreign countries other than the U.K. The discretion may not necessarily be abused but it is almost certain professional people from such other foreign countries would find it harder to get entry permits vis-a-vis U.K. professional people.

Where any entry permits A to J above has been issued to an applicant and the applicant without first getting the written approval of the immigration officer;

- (a) fails to engage within 14 days of the date of issue of the entry permit or of that applicant's entry into Kenya, whichever is later, in the employment, occupation, trade, business or profession in respect of which the permit was issued; or
- (b) has ceased to engage in the employment, occupation, trade, business or profession or;
- (c) has engaged in any employment etc. whether or not for remuneration or profit, other than the one for which he was issued an entry permit; then that entry permit will automatically cease to be valid and the presence of that person in Kenya will be unlawful.¹¹⁵

If an applicant is outside Kenya when such entry permit above is issued then the entry permit ceases to be valid only if the applicant fails to enter Kenya by virtue of that entry permit within 6 months from its date of issue.¹¹⁶ However, an immigration officer may in his discretion extend the validity of the entry permit for a further 6 months.¹¹⁷

When holders of entry permits A to C cease to engage in their employment then the specified employer in the entry permit must report to the immigration officer in writing of the event within seven days failing which he will be guilty of an offence.¹¹⁸ An employer of entry permit holders of classes A, D and E will also be guilty of an offence if when so requested by an immigration officer he fails to supply within thirty days the names and duration of service of citizen and non-citizen employees in his firm or if the information he supplies on such request is or may be reasonably known to be false in any material particular.¹¹⁹

(11) Class K

A permit in this class may be issued to a person who -

- (a) is not less than 21 years of age; and
- (b) has in his own right and at his full and free disposition an assured annual income of not less than the amount stated below; being an income that is assured, and that is derived from sources other than any such employment, occupation, trade, business or profession as is referred to above and being an income that either;
 - (i) is derived from sources outside Kenya and will be remitted to Kenya; or
 - (ii) is derived from property situated, or a pension or annuity payable from, sources in Kenya; or
 - (iii) will be derived from a sufficient investment capital to produce such assured income that will be brought into and invested in Kenya; and
- (c) undertakes not to accept paid employment of any kind should he be granted an entry permit of this class; and whose presence in Kenya will be of benefit to Kenya.

The amount of assured income that an applicant for the Class K entry permit is supposed to have is: (a) if it is a man without a wife or dependent children it must be K.£1,200 p.a.; (b) if it is a woman without dependent children it must be K.£1,000 p.a.; (c) if it is a married man or widower with dependent children it must be K.£2,500 p.a. and (d) if it is a woman with dependent children it must be K.£2,000 p.a. The prescribed amounts are the minimum amounts of annual assured income an applicant must have. One must check in the Gazette to obtain the exact sums at a particular time.

An entry permit of Class K will remain valid for as long as the holder thereof has in his own right and at his full and free disposition the appropriate assured annual income. This class of entry permit is the most favourable for people who want to settle in Kenya. The particular entry permit is designed for people who have investments or wish to have investments in Kenya without which, and in the absence of any outside sources of income, they cannot survive in Kenya.

It was noted elsewhere in this chapter that a dependant's pass is normally to be endorsed on the entry permit of the applicant or principal holder of the entry permit. It is at the discretion of an immigration officer to do so however. As will be appreciated from the provisions relating to class K entry permit the holder thereof is not allowed to accept paid employment. Since the "holder" of an entry permit includes dependants whose names are either endorsed on the entry permit of the principal holder or applicant or by reason of the terms of the entry permit it follows that dependants of the holder of the class K entry permit will become holders of that entry permit by reason of either of the above actions. That being so dependants as holders of the entry permit of class K will be guilty of an offence if they accept paid employment.

However there is nothing to stop or prevent a dependant whose name is not endorsed on the entry permit of the principal holder or who is not a

holder of such an entry permit by reason of any terms of that entry permit from engaging in paid employment. This will always be the case if the dependant is in possession of a dependant's pass and class D entry permit which have nothing to do with the entry permit of the applicant. For this reason it is always best to apply for a dependant's pass and class D entry permit if the dependants would wish to be employed. The best thing to do is simply to arrive in Kenya initially on one's own as the holder of a class K entry permit. When all is fine one must then apply for dependants passes from the immigration office; and later for class D entry permit. This works out conveniently. If, however, one applies for an entry permit of that class for himself and his dependants then their names will almost invariably be endorsed on the entry permit. That means that they are automatically holders of that entry permit and cannot, like the principal holder, engage in any paid employment.

The provision relating to class K entry permits deliberately omits the mention of unpaid employment of the holder of that entry permit. That being so, the holder(s) of that class of entry permit can legally accept unpaid employment. It is not hard to see that that is a loophole in the Act. A firm may take a person as an "unpaid employee"¹²⁰ but there is nothing in the Act to stop the employer from giving that person substantial allowances or benefits or even honorarium payments, or substantial directorship fees. This can of course be easily stopped by providing that the holder of the entry may not accept unpaid employment as well or by providing a clause that bars indirect or disguised employment, as in the U.K.

It is abundantly clear that provided the holder(s) has/have the assured annual income as prescribed and with prior approval in writing, there is nothing to stop them from engaging in self employment, for example, in business or trade. The Act simply requires that the assured annual income must not be obtained either by reason of paid employment or by reason of

engaging in any occupation, profession, business or trade. All that this means is, as long as the assured income can be shown to be flowing in from the permitted sources then provided prior written approval of an immigration officer has been obtained the holder(s) thereof may engage in any paid employment or self-employment freely. Self-employment¹²¹ is analogous and almost co-extensive with a contract for services which differs markedly from paid employment which is a contract of service. This also constitutes a leeway in favour of holders of entry permits of class K.

(12) Class L

This applies to person who is not in employment, whether paid or unpaid, and who under the repealed Acts was issued with a resident's certificate, or who would have on application been entitled to the issue of such certificate, or who has held an entry permit or entry permits (whether issued under the present Act or under the repealed Act or both) of any of the foregoing classes of entry permits A - K for a continuous period of not less than 10 years immediately before the date of application, and whose presence in Kenya will be of benefit to the country. It was noted that a person who held a resident's certificate under the former Act of 1956 or is deemed to hold that certificate by virtue of S.18(2) of the 1967 Act is virtually free of control under the present law. This is because under the repealed Act a resident's certificate had, inter alia, the effect of conferring on its holder power to stay in Kenya for life without being subject to removal or deportation.¹²² Such a person still remains virtually free of control under the present immigration law (the 1967 Act) until he is required by the Minister for Home Affairs at any time by notice in the Gazette to apply to an immigration officer for an entry permit.¹²³ If he is so required then on application he will be issued with an entry permit of class L if he was previously holding an entry permit of any of the above classes A - K inclusive, for a period of not less than 10 years immediately before

the date of his application. If he held the entry permit for a lesser period then s.19(1) of the Act provides that he has to settle for a pass. In the latter case the stay of the person in Kenya is by that action curtailed to the extent of the validity of that pass. In the alternative the immigration officer may issue a provisional entry permit of the class of entry permit he previously held.¹²⁴ A provisional entry permit for so long as it remains in force has the same effect as an entry permit of the same class of Classes A - K above.¹²⁵ A provisional entry permit remains in force for the period therein specified or, if no period is specified, until it is revoked by an immigration officer; it continues in force thereafter for three months after the date on which the notice was issued, or is published in the Gazette, whichever date is earlier, and it then expires.¹²⁶ The holder thereof must then leave Kenya within the three months before it expires.

A person who held an entry permit for ten or more continuous years before he is invited to apply for an entry permit will be given a class L entry permit notwithstanding that he previously held any of the other entry permits A - K, if he can show that his stay in Kenya will be of benefit to the country, whatever that means. To hold a class L entry permit as opposed to a pass or a provisional entry permit means that the person's stay in Kenya is more secure than in the other two cases.

The holder of an entry permit of classes K and L will be guilty of an offence if he engages in any employment, occupation, profession, business or trade without the prior approval in writing of an immigration officer. If he is refused leave to take employment or to engage in any occupation, profession, business or trade then it means he must sit and do nothing no matter how able bodied he is. If he takes employment or engages in any occupation, profession, business or trade in defiance of a refusal then he not only becomes guilty of an offence but his entry permit ceases to be valid.¹²⁷ If his entry permit ceases to be valid then he must leave the country. It would be very harsh, to put it mildly, to expect people who have worked in the country for as long as ten years or people who are bringing

valuable investments in the country to sit at home regardless of their age if they are at the same time given virtually permanent terms of residence in the country. This may be likened to compulsory retirement with the right to starve.

(13) Class M

This applies to person who is a refugee, that is to say, is, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion unwilling to avail himself of the protection of the country of his nationality or who, not having a nationality and being outside the country of his former habitual residence for any particular reason and is unable or, owing to such fear, is unwilling to return to such country; and any wife or child over the age of 13 years of such a refugee.¹²⁷

This provision comprises refugees strictly so called, and stateless people. It has its own definition of child for the purpose of the Immigration Act 1967. This cannot be accepted without criticism. It is obvious that the influx of refugees causes a great deal of hardship both to the State of sanctuary and to the individual involved. It does not make matters easier to refuse a refugee permission to bring his children over 13 years when they will in all probability be helpless at that age. It is true that children over 13 years of age and other "dependants" of the refugee will be admissible on their own account but that is subjecting the whole family to an ordeal instead of one member only.

A person to whom an entry permit of Class M is issued is free of the immigration law in relation to self-employment. Accordingly he can engage in any occupation, trade, business or profession without need of

any approval. However the Act is curiously silent on whether or not such refugees may accept employment without or with the approval of an immigration officer. The omission is probably deliberate and that being so refugees cannot be allowed to take employment, paid or unpaid. That restriction is hard to justify in the case of a person who is a genuine refugee.

A child of a refugee under the age of 13 need not have an entry permit or pass for the purpose of entry into or stay in Kenya.¹²⁹

Immigration officers are authorised to keep registers of and give identity documents to all refugees; that is holders of Class M entry permit.¹³⁰

General: Having looked at all the entry permits it is now necessary to look at points of general application. Firstly, an entry permit issued in respect of a person not present in Kenya at the time of issue ceases to be valid if that person fails to enter Kenya within 6 months from the date of issue.¹³¹ However, immigration officers have a discretion to extend the validity of such an entry permit for a further 6 months when it must expire irrevocably.¹³²

Secondly, an immigration officer may at any time cancel an entry permit or vary the terms and conditions as he may think fit.¹³³ This is a very serious matter and it is presumably because of that that it is made compulsory for immigration officers to consult the Minister for his confirmation of a cancellation of an entry permit.¹³⁴

The period of validity of an entry permit is at the discretion of an immigration officer.¹³⁵ This is entirely sensible if account is to be taken of whether or not these are skilled Kenyans available in the market to take up jobs held by entry permit holders. Normally, however, an entry permit for employment is given for two years initially. There is

ample power to extend the period of validity of an entry permit.¹³⁶ It may not, however, be issued or extended for a period exceeding five years from the date of issue or renewal.¹³⁷ An entry permit's longest life is five years but it can be renewed any number of times provided that the period of validity of each renewal does not exceed five years. A person who has not become a citizen of Kenya after five years residence still needs an entry permit to enable him to remain and/or work in Kenya. There are no provisions equivalent to the U.K. settlement provisions that enable a person who has been in the country for up to five years to remain in the country without any restriction whatsoever. For this reason a person who is not a citizen of Kenya is perpetually a migrant worker until he/she becomes a citizen of the country.

Subject to any exemptions made by the Minister every entry permit is given on the payment of a prescribed fee.¹³⁸ The fees are payable within 90 days from the date the applicant thereof has been notified by an immigration officer in writing that the entry permit has been approved failing which the approval is automatically invalidated.¹³⁹ The fees are varied from time to time by the Minister by notice in the Gazette but it must be noted that they are generally substantial. For example, entry permit of Class A is issued on payment of £200 sterling. The amount is also to be paid for every year of the validity of the entry permit or its renewal.

Finally, the phrase "... will be of benefit to Kenya" as used in relation to all the entry permits confers on immigration authorities the widest possible discretion. It is submitted that when considering whether a non-citizen's presence in Kenya will be of benefit to the country economic, political and social factors may be taken into account. Thus the mere satisfaction of the regulations by a non-citizen applying for an

entry permit forms only a part of all the possible things that may be taken into account. This power should be used very sparingly because by its very nature it is liable to abuse and interpretation problems. For example, is an immigration officer qualified to judge whether or not the admission of a non-citizen will be of bad or good influence to the Kenyan society at large? Moreover, is he qualified to judge what is good or bad for the Kenyan society?

Exempted and Excluded People

Exempted and excluded people do not need to be in possession of either passes or entry permits in order to enter or to remain and work in Kenya.

(a) Exempted People

It was noted elsewhere that the possession of a pass or an entry permit does not apply to any person, or class or description of persons, exempted by the Minister by notice in the Gazette.¹⁴⁰ So, far the only people exempted are -

- (1) all those who are in the employment of Harambee Secondary ~~Secondary~~ Schools as teachers and who are not engaged in any other employment, occupation, trade, business or profession, whether or not for remuneration or profit;
- (b) All those in the employment of Gertrude's Garden Childrens' Hospital; and
- (c) the wives and children under the age of 18 years of the exempted people in (a) and (b) above and who are not engaged in any employment, occupation, trade, business or profession.¹⁴¹

Harambee Schools number more than 600 now. They are schools supported by funds from a pool of contributions made by the community in that or other area for the benefit of students who cannot find secondary school places in Government supported schools or other institutions.

If holders of exemption certificates remain in the country for five years or over, then they are eligible to apply for citizenship. But as long as they remain non-citizens they are subject to the immigration law to the extent that they cannot freely engage in any other work than the one they were accepted into the country to come and do. However, there is nothing to stop a person in the employment of an Harambee School from switching over to the employment of the Gertrude's Garden Children Hospital. But their wives and children cannot take up jobs in the two institutions without any permission. In all other respects exempted people are generally free of immigration controls.

(b) Excluded People

The Minister has power to exclude people who are otherwise subject to control under the immigration law from the provisions of the Act.¹⁴² The people excluded presently are: (i) a passenger in, or a member of a crew of any ship, aircraft, train or vehicle; (ii) a person whose name and particulars are included in the passenger list or crew manifest of the ship, aircraft, train or vehicle; and (iii) a person proceeding in such ship, aircraft, train or vehicle to a destination outside Kenya.¹⁴³ They are excluded from the necessity of having to obtain an entry permit or pass as otherwise it is required under the Act.¹⁴⁴ The exclusion ceases automatically if such an exempted person fails to continue his journey to a destination outside Kenya in the ship, aircraft, train or vehicle in which he entered Kenya or, being a member of the crew in another ship, aircraft or vehicle in the same ownership as that in which he entered Kenya.¹⁴⁵

A person who is so excluded and who is not a member of the crew must leave Kenya by the ship, aircraft, train or vehicle in which he came. That means that a person can stay in Kenya for a few days if at all. But such a person may stay longer if the ship, aircraft, vehicle or train in which he came is delayed for servicing or other reasons.

A member of the crew may stay longer than an ordinary passenger and there is no obligation, understandably, for them to leave in the same ship, aircraft, train or vehicle in which they came. A person excluded from the necessity of obtaining a pass or an entry permit as above may have his leave to remain in Kenya for that limited time terminated by an immigration officer at any time.¹⁴⁶ If it is terminated then the person must leave, or apply for a pass or entry permit to enable him to remain in the country.¹⁴⁷

Finally a prohibited immigrant cannot be permitted to enter Kenya as an excluded person.¹⁴⁸

CONCLUSION

The administration of immigration law in Kenya is entirely in the hands of the immigration authorities. There is no appeals system presumably because immigration is still considered a matter of "great public importance".¹⁴⁹ Presumably that means that immigration is a matter of great political, economic and social importance to the Government. Accordingly only the executive authorities who are, supposedly responsive to political, economic and social climates are equipped to make decisions on immigration matters. If that is so, it may be argued, by way of analogy, that immigration matters are of just as much political, economic and social importance to the U.K. in which there is an immigration appeals system. Public importance of immigration matters is therefore not inconsistent with the existence of an independent adjudication system.

The operation and administration of immigration in Kenya is markedly different from that of the U.K. For example, the visa system is not as widely or as rigidly applied in Kenya as in the U.K. This may well be the case in future though. On the whole the U.K. system is overly complicated and confusing, but this is largely due to the U.K.'s "legacies"

from the imperial era. On the other hand the discretion in the hands of the Kenyan immigration authorities far exceeds that of their U.K. counterparts, particularly in regard to the issue of entry permits or passes. In some cases the power to grant or refuse entry permits when taken on the whole is more diffused than that exercised by U.K. immigration authorities. For example, if a Kenyan non-citizen wanted an entry permit for the carrying out of a business he must first of all get the requisite licences (probably from the Registrar-General's Department or another Ministry); get consent to own land if he requires it; satisfy the appropriate Ministry that he has sufficient money for his intended business and get any other permission or authority that may be necessary from various departments of the Government. There are therefore myriads of differences, most of which are small but essential. In both countries, however, a very tight system of immigration control is operated. In the U.K. it may be said that the controls hurt "coloured" immigrants more than any other racial group and in Kenya it may be said that the controls hurt people of Asian origin and who are unfortunately not citizens of Kenya or have not been so registered although they have been resident in the country for a long time.

Finally, although a very high standard of immigration control has been achieved in both countries there are signs that there will be greater and severer controls in the future.

FOOTNOTES
(Chapter Four)

1. Act. No. 25, 1967.
2. Non-citizens does not include indigeneous citizens of Uganda and Kenya or holders of resident certificates or exemption certificates.
3. The exception is a holder of Class D Entry Permit; viz, a holder of a dependant's pass offered a specific job by a specific employer.
4. Nationals of Denmark, Italy, Spain, Norway and Colonies, Turkey, San Marino, Uruguay, Ethiopia, Sweden, The Federal Republic of Germany, The Republic of Ireland and nationals of all Commonwealth countries other than U.K. passport holders of Pakistan, Indian and Bangladesh origin, Nigeria and Australia, do not need to obtain visas prior to their departure for Kenya as they are not required to have visas.
5. Kenya High Commission (London) Letter KHC/18/1/72.
6. Immigration Act 1967, s.7.
7. *ibid.*, s.4.
8. *ibid.*, s.13(1)(9).
9. Kenya High Commission (London) Letter KHC/46/01 and Immigration Act 1967, s.2(1)(c).
10. Immigration Act 1967, s.2(1)(c).
11. Legal Notice 235, 1967.
12. Kenya High Commission (London) Letter, KHC/46/01.
13. Econ Air Travel Agency Notes, 1977, Plan NK 9R(b). Although this is not published in any legal notice it is probably legal since the Minister has power under s.10(2) of the 1967 to give instructions of any nature to immigration officers.
14. Immigration Act 1967, s.3(2).
15. *ibid.*, s.3(3).
16. *ibid.*, s.3(1), paras. (a)-(i).
17. Re Marles Application 1958 E.A. 153.
18. Legal Notice 235, 1967, para. 32(1).
19. *ibid.*, para. 33(1).

20. Immigration Act 1967, s.2(1)(c).
21. Legal Notice 235, 1967, para. 34(1).
22. *ibid.*, para. 35.
23. *ibid.*, para. 32(2).
24. *ibid.*, para. 32(3).
25. *ibid.*, para. 33(4).
26. *ibid.*, para. 36(1).
27. *ibid.*, para. 36(1).
28. *ibid.*, para. 36(2).
29. Kenya Constitution, 1969, s.75.
30. Legal Notice 235, 1967, para. 37(1).
31. *ibid.*, para. 37(2).
32. *ibid.*, para. 14(2).
33. *ibid.*, para. 14(3): An immigration officer cannot cancel a dependant's pass without the prior approval of the Minister.
34. Re Marles Application 1958 E.A. 153, p.161.
35. Legal Notice 235, 1967, para. 14(4). The fees are revised from time to time and published in the official Gazette.
36. Legal Notice 235, 1967, para. 17(1).
37. *ibid.*, para. 17(2)(a), (b) and (c).
38. *ibid.*, para. 18(c).
39. That is so in practise from the wording of the Pupil's Pass, Form 9, Legal Notice 235, 1967.
40. Legal Notice 235, 1967, para. 18(2)(a) and (c).
41. *ibid.*, para. 18(3).
42. *ibid.*, para. 2.
43. *ibid.*, para. 15(1)(a), (b), (c) and (d).=
44. A pass holder cannot take employment or engage in any occupation.
45. E.g. a valid passport and a visa if he is required to have one.
46. Legal Notice 235, 1967, para. 19(1)(a), (b) and (c).
47. *ibid.*, para. 20(1).
48. *ibid.*, para. 20(1).

49. *ibid.*, para. 20(2).
50. *ibid.*
51. *ibid.*, para. 20(3).
52. See Immigration Act 1967, s.4(3) for exempted people.
53. Legal Notice 235, 1967, para. 15(1).
54. *ibid.*, para. 15(2)(b).
55. *ibid.*, para. 15(2)(a).
56. *ibid.*, para. 15(2)(c).
57. *ibid.*, para. 16(3).
58. *ibid.*, para. 15(3).
59. *ibid.*, para. 16(1).
60. *ibid.*, para. 16(2)(a), (b), (c), (d) and (e).
61. *ibid.*, para. 16(1)(e) proviso.
62. *ibid.*, para. 16(1)(e) proviso.
63. *Ibid.*, para. 21(1).
64. *ibid.*, paras. 21(2) and 22.
65. *ibid.*, para. 23(1).
66. *ibid.*, para. 23(1).
67. *ibid.*, para. 24(1).
68. *ibid.*, para. 24(1).
69. *ibid.*, para. 24(2).
70. *ibid.*, para. 24(2).
71. *ibid.*, para. 24(3).
72. *ibid.*, para. 2.
73. *ibid.*, para. 25(1).
74. Immigration Act 1967, s.3(3) and Legal Notice 235, 1967, para. 25(2).
75. Legal Notice 235, 1967, para. 30(1).
76. *ibid.*, para. 30(2).
77. *ibid.*, para. 30(4).
78. *ibid.*, para. 30(4).

79. *ibid.*, para. 31(1).
80. *ibid.*, para. 31(3).
81. *ibid.*, para. 30(5).
82. *ibid.*, para. 26(1).
83. *ibid.*, para. 26(2).
84. *ibid.*, para. 27(1).
85. *ibid.*, para. 27(2).
86. *ibid.*, para. 28(1)(ii).
87. *ibid.*, para. 28(2).
88. *ibid.*, para. 27(3) and proviso thereto.
89. *ibid.*, para. 27(4).
90. *ibid.*, para. 39. In 1968 an order was made waiving the requirement to pay pass fees by people already resident in the country:- D. Rothchild, p.263.
91. Legal Notice 235, 1967, para. 40.
92. D. Rothchild, p.263.
93. E.g. in September 1968 8000 out of 9000 applications for entry permits were approved, and in 1969 18,500 entry permits were approved and only 1,621 rejected: East African Standard, October 31, 1969, p.17.
94. D. Rothchild, p.264.
95. Immigration Act, 1967, 1st Schedule Form No. 3.
96. *ibid.*
97. Statement by Mark Mwithaga, National Assembly Debates, Kenya, July 20, 1967, Vol. XII, col. 2505 and Vice-President D. Arap Moi, Daily Nation, December 15, 1970, p.1.
98. D. Nzomo, Institute for Development Studies, University of Nairobi, August 1971, p.15, Staff Papers.
99. C. Leys, p. 123.
100. *ibid.*, p. 124.
101. E.g. U.S.A.
102. Societies Act, 1968.
103. Land Control Act, 1967, Act. No. 34.

104. Every Ministry from whom permission is sought probably considers each case on its merits.
105. Laws of Kenya, cap. 253.
106. *ibid.*,
107. Laws of Kenya, cap. 16.
108. Laws of Kenya, cap. 299.
109. Laws of Kenya, cap. 244.
110. Laws of Kenya, cap. 525.
111. Laws of Kenya, cap. 366.
112. *ibid.*, cap. 257.
113. Legal Notice 235, 1967, 5th Schedule.
114. National Assembly Debates, Kenya, July 7, 1967, Vol. XII, Co. 1985.
115. Immigration Act 1967, s.6(1)(a), (b) and (c).
116. Legal Notice 235, 1967, para. 7(1).
117. *ibid.*, para. 7(2).
118. *ibid.*, para. 9(1).
119. *ibid.*, para. 10(1) and (2).
120. Employment has been held to exist in the following cases: R. v. MacDonald (1861) 31 L.J.C. 67 C.C.R. - part-payment by percentage of profits held to be paid employment; R. v. White (1839) 8 C. & P. 742 - gratuities were held to be payment; and Standing v. Eastwood [1912] L.T. 477 C.A. - sharing profits was held to be payment. But cf. Pauley v. Kenaldo Ltd. [1953] 1 All E.R. 266 - no payment where cloakroom attendant was paid by tips.
121. Self-employment must be distinguished from paid employment - see Halsbury's Laws of England, 4th edition, vol. 16, para. 501.
122. D. Rothchild, p. 263.
123. Immigration Act 1967, s.19(1).
124. *ibid.*, s.20(1), (2) and (3).
125. *ibid.*, s.20(2).
126. *ibid.*, s.20(3).
127. Immigration Act 1967, s.6(2).
128. Legal Notice , 1972.

129. *ibid.*
130. Immigration Act 1967, s.17(1)(da) and Legal Notice 6, 1972.
131. Legal Notice 235, 1967, para. 7(1).
132. *ibid.*, proviso.
133. *ibid.*, para. (8).
134. *ibid.*, para. (8) proviso.
135. *ibid.*, para. 11(1).
136. *ibid.*
137. *ibid.*, para. 11(2).
138. *ibid.*, para. 38.
139. *ibid.*, para. 39.
140. Immigration Act 1967, para. 55. 4(3)(h) and 17(1)(g).
141. Legal Notice No. 108, 1976.
142. Immigration Act 1967, s.17(1)(g).
143. Legal Notice 235, 1967, para. 29(1)(a).=
144. *ibid.*
145. *ibid.*, para. 29(1)(b).
146. Legal Notice 235, 1967, para. 29(2).
147. *ibid.*, para. 29(3).
148. *ibid.*, para. 29(4).
149. A Kiapi, East African Law Journal, 1975, Vol. XI, No. 1, p.36.

PART THREE

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CHAPTER FIVE

CONTROL OF DISCRETIONARY POWERS OF
IMMIGRATION AUTHORITIES

In the preceding chapters a separate analysis of the immigration laws of the U.K., on the one hand, and Kenya, on the other hand, was made. It was not possible to make a comparative analysis of the respective immigration laws in detail because of the nature and different methods of operation of the laws. In this part which is going to concentrate on the means and methods of control of the discretion of immigration authorities the two countries will be dealt with together.

Discretion

The word discretion has been used in many places in the preceding materials without any attempt to define it. In its technical or legal meaning it may be described in the words of K.C. Davis. Thus an immigration authority is said to have discretion when "... the effective limits of his power leave him free to make a choice among possible ~~choices~~ ^{courses} of action or inaction."¹ As he explains himself, the words "effective limits" mean not only the power to take a choice between two or more authorised or legal courses of action but also discretion to take action that is illegal, of questionable legality or to do nothing.² It is necessary to adopt K.C. Davis' definition because it is wide enough to cover all the discretions, known or unknown, in the hands of immigration authorities. For example in the U.K. case of R. v HOME SECRETARY EX PARTE SAFIRA BEGUM³ the Court clearly recognised that in certain situations an immigration officer had a discretion to do nothing.

The most serious difficulty in this chapter is that no one knows and certainly no attempt has ever been made to list the number and extent of immigration authorities' discretions (both in interim stages and final

stages of a discretionary decision). It is a reasonable presumption, however, that there must be thousands of them. Although it has been argued that discretion is not necessarily bad, and that it is indeed useful and necessary in some cases, it is to be feared that discretion of the amount and extent that immigration officers in the U.K. and Kenya have truly constitutes a "...zone of administrative twilight in which prejudices can play a significant part".⁴

It is argued that in order to secure the minimum acceptable level of justice, no matter how measured, there must be ways of controlling the discretion that is now vested in immigration authorities in both the U.K. and Kenya. This is far from saying that immigration authorities are necessarily prejudiced. It is, rather, a recognition of the implicit vulnerable nature⁵ of the human lot. Thus an immigration officer who knows that his decision will be subject to close scrutiny and that in some cases his discretionary decision will be reversed, altered, varied or modified will try to look at any particular case in a way that affords an individual the minimum acceptable justice.

The means and methods of control of the discretion of immigration authorities will now be examined.

(1) Senior Officers

In the U.K. the power to refuse leave to enter to a passenger is vested in immigration officers who must in all such cases have the authority of the Chief Immigration Officer or an Immigration Inspector before they can so refuse.⁶ In Kenya the position is slightly different. The Immigration Act of Kenya provides that "in the performance of their functions ... immigration officers shall act in accordance with such instructions as may be given by the Minister".⁷ In particular an immigration officer cannot cancel any entry permit⁸ or a dependant's pass⁹

without confirmation or approval by the Minister respectively. There is no provision anywhere that immigration officers must consult the Principal Immigration Officer as in the U.K. It is however submitted that as a matter of good administration the Principal Immigration Officer is almost certainly consulted on all matters connected with the refusal of entry of a person into Kenya or variation of conditions of stay in the country.

In any case in the matters that immigration officers in the U.K. or in Kenya are required to consult their seniors or their Minister as the case may be, it is patently clear that their discretion is subject to close scrutiny by their seniors or Minister and to that extent their discretion is controlled.

There is no formal or procedural method of consultation. In many ways it is best to keep the system at this level informal as the kind of legal technicalities one finds himself in when approaching the courts on a matter of this kind should be kept out of the administration.

The supervision by senior officers (U.K.) and the Minister (Kenya) has been termed as "checking" of discretion by K.C. Davis.¹⁰ "Checking" means no more than that a senior official must be consulted by an immigration officer before the specified actions are taken. This is clearly a way of controlling the discretion of immigration officers and must be encouraged as it guards against arbitrariness by the immigration officers in the exercise of their discretion.

In assessing the effectiveness of the methods of consultation with senior officers (U.K.) or the Minister (Kenya) one must be mindful of the technical shortcomings of this system of control. Senior Officers or the Minister, as the case may be, who countermand the mistakes of their immigration officers will in most cases be unpopular and can, unless a proper balance is kept, "... face the danger of undermining morale".¹¹

It is possible therefore that in some cases senior officers or the Minister do turn a blind eye on the mistakes of immigration officers committed in the exercise of their discretion. It would be naive to disregard the statement of K.C. Davis in this regard. Chief Immigration Officers or Immigration Inspectors in the U.K. and the Minister or the Principal Immigration Officer in Kenya are not independent of their respective immigration officers because they "... have a continuing relation with each other", and they often have "... official, psychological or personal reasons for protecting that relation" so much so that the review of the discretionary decisions of immigration officers in both countries may be influenced by "... considerations other than the merits"¹² of the case before them.

There is one further thing worth noting. In Kenya consultation with the Minister for Home Affairs by an immigration officer when the matter in issue is a cancellation of an entry permit or a dependant's pass is purely administrative. This point must be kept in mind because as will be seen below in some cases the Minister acts in an "appellate" capacity.

(2) The Appeals Systems

In the U.K. the appeals system created by the Immigration Appeals Act 1969 is continued by the Immigration Act of 1971.¹³ As was noted in the First Part the Immigration Appeals Act 1969 created adjudicators and an Immigration Appeals Tribunal to hear appeals from many of the determinations of immigration authorities. Many of the determinations of immigration officers are discretionary ones and accordingly the adjudicators and the immigration tribunal are an important cornerstone in the control of the discretion of immigration officers.

In Kenya the only instance remotely resembling the U.K. appeals

system is an appeal to the Minister for Home Affairs. The Immigration Act of Kenya provides that "any person who has applied for an entry permit of any of the classes E to M (inclusive) and who is aggrieved by a decision refusing him such entry permit may in the manner and within the time prescribed, appeal against the decision to the Minister, whose decision shall be final and shall not be questioned in any Court."¹⁴

In the U.K. there is a two-tier appeals system to the adjudicators and the immigration tribunal whereas in Kenya there is a one-tier "appeals" system to the Minister. An "appeal" to the Minister is not an appeal in stricto sensu for a Minister is by his very position a partisan party to the appeal of an immigrant. An appeals system as that of the U.K. is preferred because it is independent and can override a Minister's decision. But the existence of an appeals system as the U.K. one depends in part on the publication of immigration rules and policies. If there are no published immigration rules and policies then the creation of an appeals system of the U.K. type would seem to be an extension of the embrace of bureaucracy.

In both countries one now begins to see formalized methods of appeal. In the U.K., depending on the type of appeal made or the section of the 1971 Act under which the appeal is made, there is a limitation period within which such an appeal to an adjudicator or the tribunal, as the case may be, must be made.¹⁵ Moreover, it is a requirement that a person refused leave to enter by an immigration officer must be given a notice informing him of the decision, the reasons for the refusal and stating his right to appeal.¹⁶ In Kenya an applicant refused any of the entry permits of class E to M (inclusive) may appeal to the Minister (through the Principal Immigration Officer) within 42 days from the date of his being notified in writing that he has been refused any of the stated

classes of entry permits.¹⁷ The appeal must be made in a statutory form together with any fees chargeable in that respect.¹⁸

In both countries an appeal against the discretionary decision of an immigration officer may be made in respect of specified matters only and whether or not the specified matter relates to the entry of the person or to the variation of the conditions of stay of that person. As has been noted, in Kenya the specified entry classes are E to M inclusive. In the U.K. there is also a limit to what these matters are, but for those on which an appeal lies the Immigration Act of the U.K. 1971 provides that an adjudicator shall allow an appeal "... if he considers where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently."¹⁹ It is important to remember that in Kenya the grant of all entry permits (including the specified classes of entry permits for the purpose of appeal) and all passes is at the discretion of an immigration officer notwithstanding that a person has satisfied the statutory requirements of an entry permit or pass he applied for.²⁰ That being so it is questionable why the refusal of entry permits, other than the specified ones, and passes are not subject to some kind of formal appeal. There is a parallel to be drawn with the U.K. Immigration Act 1971 in that apart from exempting a list of matters from any kind of appeal²¹ it further provides that "no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so."²² Thus the exercise of the Secretary of State's power in this case is unreviewable. The Tribunal has held that the effect of the provision is

that although there is a right of appeal against the refusal of the Secretary of State to grant entry to a person outside the immigration rules, the appeal must in all such cases be dismissed.²³ This is another way of saying that the Secretary of State's discretion is unreviewable for it is not possible in law to think or talk of an appeal without a remedy as the case implied.

Because of the limited area of discretion that can be reviewed under the appeals systems in both countries it means that a lot of discretions go unreviewed if they fall within the excluded classes or excluded matters in the U.K.

How effective are the appeals systems in both countries in controlling the discretions of immigration officers that they can properly control? This is a crucial question because without a certain amount of effectiveness in their control one cannot justify their creation. For the reason that the appeals systems in Kenya and U.K. are different in structure it is necessary to deal with each country's appeal system separately.

In Kenya the decision of the Minister following an appeal to him is final and shall not be questioned in any court.²⁴ The most important thing to note about an appeal to the Minister is that when he is deciding he is not acting in a judicial or quasi-judicial capacity but in an administrative capacity. The Court described it in Re Marles' Application as being "... no more than a prayer in aid of reconsideration, a request to the Minister that he should reconsider the application of his policy directive to the case of the particular applicant."²⁵ In that case M. a British subject entered Kenya in 1953 on a temporary employment pass valid for four years. In 1957 having been offered a permanent post with the Nairobi City Council he applied to the Principal Immigration Officer under s.10(2) of the Immigration Ordinance 1956 for a Class G

entry permit which was refused. His "appeal" to the Minister under s.10(5) of that Act was also refused upon which he applied to the High Supreme Court of Kenya for orders of certiorari and mandamus to quash the decision of the Minister on the ground that he was given no opportunity to state his case and was not allowed to know or to test the evidence against him. The Court dismissed his motion for the reasons given above.

Although the case above was decided during the colonial time, it is submitted that the courts would follow it at present because immigration is still regarded as a matter of privilege and because the Act vests the power to make decisions in the immigration officers and the Minister. That being so an appeal to the Minister seems to be in the nature of a request to the Minister to depart from the decision of an immigration officer. It is possible to say that the Minister has unlimited power to reverse the decision of his immigration officers. However, since the applicant is not informed of the reasons for his being refused any of the specified entry permits by the immigration officer and since he may not be allowed legal representation or be informed of the case against him,²⁶ it is open to a conclusion that the control of discretion by the Minister is not effective or cannot be seen to be effective.

In contrast a person who is refused entry to the U.K. is given reasons for the refusal and is therefore informed of the case against him. Moreover, legal representation is always allowed and in some cases at the expense of the U.K. Government.²⁷

In the U.K. adjudicators and the tribunal have power to allow an appeal from a decision or action of the Secretary of State or an immigration officer, as the case may be, if they are satisfied that the discretion should have been exercised differently.²⁸ J.M. Evans has

submitted that the immigration appeals authorities have taken a very narrow view of their jurisdiction to review an exercise of discretion on the merits.²⁹ For example some decided cases do not reveal whether the appellate authorities are dismissing an appeal because the facts fall outside the scope of the discretion defined by the rules or outside the principles formulated by the appellate authorities for the review of discretionary powers.³⁰ In two recent cases decided by the Court of Appeal it has been amply demonstrated that the appellate authorities (adjudicators and the tribunal) take a very restrictive attitude in their duty of reviewing the discretion of either the Secretary of State or the immigration officers.³¹ This is entirely in line with the appellate authorities' attitude that is revealed in COSTA v HOME SECRETARY.³² In that case the rules, by virtue of which the issue arose,³³ prescribed that if an appellant had been away from the U.K. for more than 2 years preceding his departure from the U.K. such an appellant would none the less be admitted if he had lived in the U.K. for most of his life. This rule clearly gave the appellate authorities a discretion to admit such a person into the U.K. if, for example, he had lived in the U.K. for most of his life. When the case came before the Tribunal for decision it stated categorically that it would not take into account compassionate circumstances as that was not part of its duty. It is self-evident that in that instance the Tribunal regarded the example given above (that is, living in the U.K. for a long time) as a limiting factor to their discretion which is clearly not the case.

It is therefore submitted that by reason of the fact that the appellate authorities have taken a narrow view of their jurisdiction to review discretion they do not control that discretion effectively. This is far from saying that they do not control discretion at all.

The fact that the appellate authorities in the U.K. have power to review decisions de novo (particularly the adjudicators) means that they control discretion in the interim decisions as well as in final decisions. The Kenyan system of appealing to the Minister would seem to have the same effect although no one can force the Minister to exercise the power to review a discretionary decision de novo, as the U.K. appellate authorities are required to do by law.³⁴

It has been submitted by some writers that the U.K. appellate authorities are suspect to the fear that they tend "... to rely on the impressions of the British official abroad who has refused a certificate of entry, and to reject the evidence of the documents, such as affidavits or certificates of birth, death or marriage presented by applicants" mostly from India and Pakistan.³⁵ If this is so then it is apparent that the discretion of immigration authorities from that area is nodded through without a proper control of its exercise by the appellate authorities. However, one must be wary of making unwarranted statements on this particular issue because it is a well-known fact that a lot of immigration rackets are operated in India and Pakistan.³⁶

On the whole therefore the U.K. immigration appeals system operating independently as it does controls the exercise of discretion by the Secretary of State and immigration officers. It is to be hoped that the scope of the control it exercises will sooner or later be widened to include the areas not now covered, for example, deportation.

The Kenyan system of appeal to the Minister in respect of the specified entry permits is in its totality an administrative function and for that reason one cannot be sure the extent to which it operates as a system of open justice as the Minister has the discretion to grant an applicant an oral hearing or legal representation. An appeal on the lines of the British model

is obviously called for urgently! A. Kiapi has submitted that where appeals such as in immigration matters lie to the Minister "... political considerations may play a bigger role than the interest of the individual affected".³⁷ Therefore it is not really satisfactory to have appeals to the Minister since in almost every such appeal to the Minister political considerations will weigh more heavily in the decision he makes.

(3) Courts of Law

In Kenya courts regard immigration as a privilege and accordingly they have so far refused to interfere with the decisions of the immigration authorities.³⁸ More particularly the Kenyan Immigration Act provides that the decision of the Minister in relation to an appeal from a refusal of any of the above specified entry permits will be final and shall not be questioned in any court.³⁹ A series of cases by the courts show that the mandatory terms of the Act that such a decision will not be open to question in any court will be upheld.⁴⁰ Refusal or grant of any other entry permit or pass is also at the discretion of immigration authorities who exercise that discretion in accordance with the directions or instructions of given by the Minister. These discretions cannot apparently be reviewed by the Courts because in Re Marles' Application⁴¹ the court held that the discretions are exercised on grounds of expediency and policy of the Minister and since the Minister may take into account extraneous matters (probably political matters) the courts cannot review decisions arising from them. Moreover, the fact that the courts in Kenya regard immigration as a privilege would seem to preclude any review of discretionary decisions of immigration authorities since there are no rights involved.

The U.K. courts have taken a different view with regard to the review of discretionary decisions. The general rule is that a phrase excluding the jurisdiction of the court to review discretionary decisions gives those decisions protection only if the decisions are validly made. Thus if the authorities act ultra vires their discretion or otherwise exercise it contrary to the law the courts cannot be deterred from reviewing their discretionary decisions.⁴² The main impact of this interpretation that the courts have taken in the U.K. is that they are normally free to review any discretionary decision whether of immigration authorities or others. It has been argued that a distinction can be made between "objective discretion" in which defined or ascertainable criteria are given by an empowering legislation, against which the decision-maker's choice or discretion can be measured, and "subjective discretion" in which no guidelines as to the exercise of discretion are given.⁴³ Whereas the courts have always controlled objective discretion the control of subjective discretion is a recent legal development which is viewed by some writers as a "disturbing" development.⁴⁴ The importance of the approach taken by the U.K. courts is that they are able to control the exercise of discretionary powers of the Secretary of State and the immigration authorities whereas the approach taken by the Kenyan courts does not permit them to control the exercise of discretion either by the Minister or by the immigration officers.

In the U.K. the courts' power of review is limited by various reasons but mainly by their narrow approach to the review of discretion relating to immigration matters. Except in the most exceptional cases the courts will not review the decisions of immigration authorities, whether discretionary or not, unless there has been an appeal to the appellate authorities in the first place. In R. v. PETERKIN (ADJUDICATOR) EX PARTE SONI⁴⁵ the court clearly accepted that it would not interfere with a

decision of an adjudicator which had an error of law on its face because there was an opportunity for the appellant to appeal to the Tribunal and as he had not done so there was nothing the court could do. This decision applies to the decisions of immigration authorities with equal force. Accordingly, the narrow ground upon which the courts can interfere with discretionary decisions clearly means that no effective control of discretion by the U.K. courts is made.

Remedies

In the U.K. courts cannot interfere with any discretionary decision made with regard to immigration law except by certain means. The means are, habeas corpus, certiorari and mandamus in *England, Wales and Northern Ireland* 24.5a

In Kenya the use of habeas corpus by the courts is presumably pre-empted by the fact that the Immigration Act 1967 expressly provides that a person who is detained or held in any way by immigration authorities or on their directions will be in lawful custody.⁴⁶ This is a privative clause in its nature and effect and in a U.K. case of R. v. GOVERNOR OF BRIXTON PRISON EX PARTE SARNO [1916] 2 K.B. 742 it was held that a clause that stipulates that the detention of a person "... shall be deemed to be legal custody" does not preclude the court from deciding whether or not the powers under the statute have been properly pursued. It is hoped that the Kenyan courts will adopt this attitude and review such detentions on jurisdictional grounds where possible. Moreover, in COX v HAKES (1890) 15 App. Cas. 506 it was held that as "... a general rule, the courts are unwilling to interpret any statute in such a way as to curtail habeas corpus unless the statute refers to the writ". It is submitted that the case forms part of the Kenyan common law because it was decided before the Reception Date of August 12, 1897 and accordingly ^{not} since the Immigration Act 1967 does/specifically refer to habeas corpus

the privative clause will not bar the courts from issuing it in a case of detention under the Act.

In the U.K. courts will review the discretion of immigration authorities to detain or hold a person albeit on very narrow grounds. The U.K. courts are prepared to exercise their discretion to issue habeas corpus for the release of a person only if the applicant can show a prima facie case that his detention is illegal.⁴⁷ In R. v. HOME SECRETARY EX PARTE MUGHAL⁴⁸ Widgery LCJ held that habeas corpus was inappropriate where the applicant was refused entry at a port of entry because he was not technically in the country, and by refusing to return to his country as a result of which he was detained, he was not denied his freedom but merely chose to remain in custody. The court was in effect saying that the applicant was not restrained, a reasoning which has been highly doubted.⁴⁹ Accordingly the use of habeas corpus has been limited to the extent that the applicant must show that he was detained illegally and that he was not detained following a refusal to return to his country after leave for entry was refused. That the onus of proof is on the applicant to show that he was illegally detained is an additional limitation in that it is often very hard to prove it because of the lack of documents. Thus the exercise of the discretion to detain a person by immigration authorities is only partially controlled or controllable by the courts of law in the U.K.

The other method which is commonly used by the courts of law in the U.K. to review discretionary decisions of immigration authorities is that of certiorari and mandamus. Mandamus will issue to secure the performance of a duty to exercise a discretion⁵⁰ and certiorari issues to quash an order made by administrative authorities if the function of the authority can be characterised as "judicial" even if partially.⁵¹ Thus, although there is no express statutory right of appeal from the appellate authorities to the courts the latter can nevertheless review the decisions of the appellate authorities by means of the above remedies.⁵² In

R. v IMMIGRATION APPEAL TRIBUNAL EX PARTE S.G.H. KHAN⁵³ the Queen's Bench Division of the High Court issued the orders of certiorari and mandamus to quash the decision of the appellate authorities and order them to determine the issue afresh because on the facts before the court there was no evidence to support their findings. It is important to note that it was within the discretion of the appellate authorities to choose what evidence to take into account.

In yet another case of R. v IMMIGRATION TRIBUNAL EX PARTE K. JEYAVEERASINGHAM⁵⁴ the court held, when refusing orders for certiorari and mandamus that the Tribunal was not required to look at any additional or fresh evidence when considering whether to grant leave, for it was within its discretion to take the view that it would not grant leave to appeal by looking at the issues raised in the determination only.

It is clear from these cases that there is no general principle upon which the courts will grant certiorari and mandamus in any particular situation. However, it is as plain as can be that it is only in the most exceptional cases that courts will issue a certiorari and mandamus in respect of a decision of an adjudicator and before an appeal to the Tribunal has been made and determined.⁵⁵ It is equally certain that that is the case with respect to decisions of immigration authorities although it is doubtful that courts have any control over their exercise of discretion.

The last method by which the U.K. courts may and can control the exercise of discretion by immigration authorities is if there has been a breach of natural justice by the authorities. In Re K.(H.) (an Infant)⁵⁶ Lord Parker C.J. held that "... good administration and an honest and bona fide decision must ... require not merely impartiality nor merely

bringing one's mind to bear on the problem, but of acting fairly, and to the limited extent that the circumstances of any particular case may allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so called rules of natural justice apply which in a case such as this is merely a duty to act fairly."⁵⁷ The court further noted that the duty to act fairly is not precluded by the fact that there is no duty to act judicially.

In every case, therefore, immigration authorities and appellate authorities have a duty to act fairly to the extent that the immigration law and the rules and the circumstances of a case permit. This has been clearly re-affirmed by the case of PADMORE v. HOME SECRETARY.⁵⁸ However, apart from the restricted approach given to natural justice by the courts as spelled out above, there are two other restrictions. Firstly, there is no exercise of discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of appellant to depart, or to authorise an officer to depart, from the rules and he has refused to do so. In HOME SECRETARY v GLEAN⁵⁹ the appellant appealed to the Tribunal from the decision of the adjudicator that it would be against the principles of natural justice to compel Glean to leave the U.K. on grounds that he overstayed in the country in breach of his conditions when his wife and two children elected to remain in the U.K. as they were entitled to do. The Tribunal held that the decision of the Secretary of State to refuse Glean further leave to stay was in accordance with the Immigration rules and therefore natural justice did not apply.

Secondly, the courts have shown an extreme reluctance to review the discretion of the Secretary of State on grounds of breach of natural justice if the Secretary of State decides to deport a non-patrial on

on grounds conducive to the public good as being in the interests of national security. In R. v HOME SECRETARY EX PARTE HOSENBALL⁶⁰ the appellant, Mr. Hosenball, had been served with a notice of the Secretary of State's intention to deport him on grounds conducive to the public good as being in the interests of national security under s.3(5)(b) of the Immigration Act 1971. He had no right of appeal under the appeals system established by the Immigration Act but he was entitled to make representations and appear before an independent advisory panel. He was not given the details of the charges against him or the advice of the panel to the Home Secretary. Accordingly Mr. Hosenball appealed to the Court of Appeal from the decision of the Divisional Court refusing certiorari to quash the decision of the Secretary of State as being in breach of the rules of natural justice. The Court of Appeal, while not saying that it would refuse to interfere with every decision of the Secretary of State to deport a person on grounds conducive to the public good as being in the interests of national security, adopted a very narrow approach in that it said that where national security is involved then the rules of natural justice must take the second place to national security. Thus the duty to act fairly cannot be policed adequately in such cases.

It must be noted that where there has been a breach of natural justice then the courts can interfere with the discretion of immigration authorities by means of certiorari and mandamus. In the area of immigration law therefore the protection of the status or interest of a person follows the remedies available.

Although the courts not only control the discretion of immigration authorities but also formulate rules against which the discretionary decisions of immigration authorities may be tested, it is submitted

that their control is limited both by their narrow approaches, their reluctance to interfere with discretionary decisions of immigration authorities, the statutory limitations as to what they can review and the nature and number of remedies available. In Kenya there is no control by the courts except when the State wishes to enforce the decision of immigration authorities against non-citizens. This is because the Kenyan Government regards immigration to the country both as a privilege and as matter of great public importance to be entrusted to the courts or tribunals.⁶¹ Thus the needs of an immigrant are not a fact or a right but a matter of opinion and it is the Minister and the officials working under him who decide it⁶² and not the courts or tribunals. Immigration is therefore a matter of ministerial discretion. The U.K. immigration law has, from 1914 when opportunities for review by the courts of the discretionary decisions of the Secretary of State were allowed, moved to the point of clothing immigration authorities with the duty of acting fairly in dealing with immigrants in favour of whom succeeding Acts of 1962, 1968, 1969, and 1971 have created certain rights. If these rights are not observed then the courts will review their decisions by habeas corpus, certiorari and mandamus. Perhaps the significance of treating immigration as a matter of privilege and discretion as in Kenya, and not of rights and law is that the government is free to regulate the flow and employment of immigrants into the country according to the economic ups and downs and according to the public pressure. If an appeal to a tribunal, or the courts was allowed as in the U.K. then the government would to some extent lose its control. This may help to explain why the grant or refusal of work permits is not a matter for the adjudicators, the tribunal or the courts to decide in the U.K.

One distinction must be mentioned here. In the U.K. the Courts are

very reluctant to apply natural justice rules to decisions that are made by virtue of discretionary powers couched in very wide subjective terms.⁶³ In Kenya the courts have willingly applied rules of natural justice to non-judicial bodies with wide powers to exercise policy discretion⁶⁴ but, as has been stated elsewhere, this does not apply to immigration law by virtue of the dicta of Re MARLES' APPLICATION case⁶⁵ which categorically prohibited any review of a discretionary decision on grounds of natural justice if there is an unambiguous privative clause which takes away the jurisdiction of the Court.

Human Rights

Finally the U.K. courts will not review the discretion of immigration authorities merely because or by reason only that the immigration authorities have refused to refer or did not look at the European Convention on Human Rights. In R. v CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT⁶⁶ the Court of Appeal held that the courses open to any immigration authority was specifically laid down in the rules and there was no need for any of them to look further. This decision was in accordance with earlier decisions of R. v HOME SECRETARY EX PARTE B. SINGH⁶⁷ and PAN-AMERICAN WORLD INCORPORATED v DEPARTMENT OF TRADE⁶⁸ that if there was any ambiguity in the U.K. statutes or any uncertainty in the law then, and only then, could the courts refer to the Convention as an aid to the interpretation of the statute or the principles of the law.

Further, it was held recently in the case of R. v HOME SECRETARY EX PARTE HOSENBALL⁶⁹ that the European ~~Commission~~^{Convention} of Human Rights did not apply to the discretion of the Secretary of State in deporting a non-patrial on grounds conducive to the public good as being in the interests of national security because that constituted an act of state falling within the public sphere and did not constitute a determination of his

civil rights or obligations.

It would appear therefore that the existence of the European Convention on Human Rights has not done anything to abate the amount of uncontrolled discretion in the hands of immigration authorities in the U.K. It is submitted however, that in so far as the European Commission on Human Rights remains in a certain sense a court of final appeal it does itself control a good deal of discretion of immigration authorities. For example, in SANIJI MANJI LALJI PATEL⁷⁰ the Commission heard complaints by 25 East African Asians who were refused entry into the U.K. to settle there permanently and in all the cases the Commission ruled that the complaints were justified in that what was complained of was in breach of certain Articles of the Convention of Human Rights.

FOOTNOTES
(Chapter Five)

1. K.C. Davis, p.4. See also R.C. Austin, Current Legal Problems (1975) vol. 28, p. 150.
2. R.C. Austin uses the term discretion in a sense that tends to exclude discretion that is illegal or of questionable legality - (1975) vol. 28, p. 150.
3. The Times, May 28, 1976, Q.B.D.
4. R. Moore and T. Wallace, p. 14.
5. R. Martin, p. 54.
6. H.C. 79 (1973) para. 59, and H.C. 81 (1973) para. 59.
7. Immigration Act 1967, s.10(2).
8. Legal Notice 235, 1967, para. 8 proviso.
9. *ibid.*, para. 14(3) proviso.
10. K.C. Davis, p. 55.
11. M. Hill, p. 149.
12. K.C. Davis, pp. 144-145.
13. Immigration Act 1971, s.12(a) and (b).
14. *ibid.*, s.5(3).
15. The New Law Journal, July 31, 1975, vol. 125, No. 5710, pp. 745-748.
16. H.C. 79 (1973) para. 67 and H.C. 81 (1973) para. 69.
17. Legal Notice 235, 1967, para. 12.
18. *ibid.*, Form S.
19. Immigration Act 1971, s.19(1)(a)(ii).
20. Immigration Act 1967, s.5(2); Legal Notice 235, 1967, para. 14(2) and RE MARLES APPLICATION [1958] E.A. 153 p. 161.
21. There is no appeal against the discretion:
 - (i) to refuse or grant a special voucher - SHAH v HOME SECRETARY [1972] Imm. A.R. 56.
 - (ii) of the Department of Employment to issue or refuse a work permit - LATIFF v HOME SECRETARY [1972] Imm. A.R. 76.
 - (iii)/

- (iii) of the Department of Employment to approve a training scheme - LATIFF v HOME SECRETARY [1972] Imm. A.R. 76.
 - (iv) of the Secretary of State that leave to enter the U.K. must be refused or that the refusal of an entry clearance must be refused on grounds that the refusal of such entry or entry clearance is conducive to the public good - Immigration Act 1971, s.13(5).
 - (v) of the Secretary that the departure from the U.K. of a person is conducive to the public good as being in the interests of national security etc. - Immigration Act 1971, s.14(3).
22. Immigration Act 1971, s.19(3).
 23. T. KHAN v ENTRY CLEARANCE OFFICER, DACCA [1974] Imm. A.R. 55.
 24. Immigration Act 1967, s.5(3).
 25. [1958] E.A. 153, p. 162.
 26. RE MARLES APPLICATION [1958] E.A. 153.
 27. Immigration Act 1971, s.23.
 28. *ibid.*, s.19(1)(a)(ii) and (4).
 29. J.M. Evans, p. 135.
 30. *ibid.*, and HOWARD v HOME SECRETARY [1972] Imm. A.R. 93; cf. NEEDHAM v E.C.O., KINGSTON, JAMAICA [1973] Imm. A.R. 75.
 31. R. v IMMIGRATION APPEAL TRIBUNAL EX PARTE RASHILA P. MEHTA [1976] Imm. A.R. 38 and R. v IMMIGRATION APPEAL TRIBUNAL EX PARTE V. M. MEHTA (1976) Imm. A.R. 174.
 32. [1974] Imm. A.R. 69.
 33. H.C. 79 (1973) para. 52.
 34. Immigration Act 1971, s.19(2) and (4) and R. v. IMMIGRATION APPEAL TRIBUNAL, EX PARTE S.G.H. KHAN [1975] Imm. A.R. 26.
 35. I. Macdonald, p. 85 and J.M. Evans, p. 137.
 36. The Guardian, April 25, 1977, p. 1 and 20.
 37. A. Kiapi, East African Law Journal, 1975, vol. XI, p. 63.
 38. RE MARLES APPLICATION [1958] E.A. 153.
 39. Immigration Act 1967, s.5(3).
 40. RE MARLES APPLICATION [1958] E.A. 153 and CHITE v E.A. COMMUNITY [1970] E.A. 487.
 41. RE MARLES APPLICATION [1958] E.A. 153.

42. E.g. ANISMINIC v F.C.C. [1969] 2 A.C. 147.
43. R.C. Austin, Current Legal Problems (1975) Vol. 28, p. 150.
44. *ibid.*, p. 153; cf PADFIELD v MINISTER OF AGRICULTURE [1968] A.C. 997 where there was subjective discretion.
45. [1972] Imm. A.R. 253, Q.B.D.
- 45(e) *Other remedies apply in Scotland.*
46. E.g. Immigration Act 1967, ss.9(4), 12(2) and 8(8).
47. RE WAJID HASSAN [1976] 2 All E.R. 123.
48. [1973] 1 W.L.R. 1133.
49. R.J. Sharpe, p. 168.
50. de Smith, p. 300.
51. *ibid.*, p. 302.
52. R. v IMMIGRATION APPEAL TRIBUNAL, EX PARTE JOYLES [1972] 3 All E.R. 297 and R. v PETERKIN (ADJUDICATOR) EX PARTE SONI [1972] Imm. A.R. 253, Q.B.D.
53. [1975] Imm. A.R. 26.
54. [1976] Imm. A.R. 137.
55. R. v PETERKIN (ADJUDICATORS) EX PARTE SONI [1972] Imm. A.R. 253, Q.B.D.
56. [1967] 1 All E.R. 226 (Q.B.D.).
57. [1967] 1 All E.R. 231.
58. [1972] Imm. A.R. 1.
59. [1972] Imm. A.R. 84.
60. The Times, March 30, 1977, p.3.
61. A. Kiapi, East African Law Journal, 1975, Vol. XI, p. 36.
62. Immigration Act 1967, s.10(2).
63. de Smith, pp. 187-188; and J.E. Alder, Public Law, 1972, p. 278.
64. MURIGAN v TRANSPORT APPEALS TRIBUNAL [1959] E.A. 19; and S.V. DEVISHI v TRANSPORT LICENSING BOARD [1971] E.A. 289.
65. [1958] E.A. 153.
66. The Times, May 12, 1975.
67. [1976] Q.B. 198.
68. The Times, July 30, 1975.
69. The Times, March 30, 1977, p. 3.
70. Decision dated October 10, 1970.

FINAL REFLECTIONS

Article 1(3) of the United Nations Charter says that the U.N.O. will "seek to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". This is an affirmation of the democratic demands of the U.N.O. for the extension of and respect for human rights. The preceding chapters have in many ways been an attempt to unfold the unjust practices of the United Kingdom and Kenya in immigration law. This is mainly due to the fact that all the countries of the world do, with varying degrees, subscribe to the notion of the sovereignty of the state to control the entry into its own borders of non-citizens.

Citizenship is by definition the link between a physical person and a state. As a rule citizenship extends to such a physical person within the boundaries of the state and also beyond them. In the case of ^{the} ~~U.K.~~ U.K. citizenship used to extend to inhabitants of her former dependencies and of the present existing dependencies. In most countries of the world immigration into a country has always discriminated between citizens and non-citizens. Thus in Kenya entry into the country by citizens is uncontrolled whereas entry by non-citizens is severely controlled. This used to be the case in the U.K. until 1962 when legislative measures were introduced by the Government to control the number of Commonwealth immigrants coming into the U.K. Inevitably this involved discrimination on entry not only between citizens and non-citizens but also between citizens depending on whether they became U.K. citizens in the U.K. or by a connection with an overseas country. However, due to the U.K.'s imperial history the number of

people excluded from entry by the U.K. by the 1962 Commonwealth Immigrants Act was small. The 1968 Commonwealth Immigrants Act tried to remedy the problem but unsuccessfully and accordingly the 1971 Immigrants Act was passed with its "infamous" 'patrial' clause which restricted entry to people with close connections with the U.K., i.e. U.K. citizens whose parent(s) or grandparent(s) was/were born in the U.K. By its very nature the patrial clause discriminated in its effect between citizens and citizens of the U.K. along racial lines in matters of entry unless one became a U.K. citizen in the U.K. itself.

For people who have to have leave to enter and remain in the U.K. or Kenya the preceding chapters reveal that there are statutory discriminations in favour of the rich and the male sections of either society. Further, in the case of the U.K. the discrimination is based on race. It must be said at once that these practices are contrary to the U.N. Charter Article 1(3) above.

It is obvious that both countries have suffered international opprobrium for their immigration policies but it is also true that both of them "viewed the domestic costs of unpopular free entry and free stay of immigrants" as overwhelmingly more important than all other factors. To some extent therefore the immigration policies of both countries are understandable even in their extremity. It, therefore, remains to suggest the areas from which most of the more condemnable immigration practices emanate or find their source and to suggest their cures.

In Kenya there is no question that the worst forms of immigration malpractices come from the absence of an appeals system and the blockade from court review of immigration authorities' decisions. The Government has done its best to keep immigration matters out of the courts through the Immigration Act 1967 in that the use of habeas corpus

and review by the courts are expressly prohibited. There is nothing inherently wrong with immigration which should make it a monopoly of ministerial discretion; and, indeed it is not inconsistent with the sovereignty of the country to subject the decisions of the immigration authorities to an independent tribunal whether that be the courts or an advisory body. The courts are partly to blame for the lack of review of immigration authorities' discretionary decisions in that unlike in the U.K. they have refused to apply the principle of ultra vires more widely and boldly. For example a privative clause should not be left to cloak the decisions of immigration authorities if they are otherwise invalid. It is true that the Kenyan courts were an intimate part of the authoritarian administrative structure during the colonial time, but so many years after independence having gone by, it is time they saw their proper perspective in the rule of law and stopped pandering to the Government of the day through extreme interpretations of the law.

The Government is also long overdue in legislating for some kind of appeals system which would guarantee that a person has been properly handled in accordance with the law even if it is a bad law. If and when such an appeals system is established it should be under the office of the Attorney-General so as to remove it from the pressures of politicians. The decisions of the body should then be appealable to the courts of law on points of fact and law. If national security is involved in any appeal then the body or court should be able to hear the matter to determine if such national security is involved. The system at the moment is autocratic and could be abused with impunity.

In the U.K. the root cause of immigration problems is the lack of nationality law that takes account of the U.K. status as a nation among many nations. The present British Nationality Act of 1948 has been

amended so many times that it has left the law in a complicated and confused state apart from the fact that the concept of her nationality is still based on the out-dated philosophies of her imperial era. Accordingly proposals have already been made for the reform of the U.K. nationality laws. Unfortunately, however, the proposals follow, to a very great extent, the patriality clauses of the Immigration Act 1971 and will therefore generate feelings of racial discrimination if followed. For this reason also suggestions made in the proposals to retain dual nationality apparently only for those who will have the right of abode in the U.K. should be abolished. It is proposed that ^{those} who have the right of abode in the U.K. will be those who are patrials under the Immigration Act 1971, Asian U.K. passport holders from East Africa who have made U.K. their home and women citizens of the U.K. and colonies who do not qualify for British citizenship in their own right but whose husbands would become British citizens.

It is argued in para. 63 of the proposals (Cmnd. 6795) that it would be expensive and complicated to ban dual nationality completely because of the large numbers of people from the U.K. living abroad and people from other countries living in the U.K. The latter reason must be dismissed because other countries have non-citizen people living there although there are no dual citizenships of the kind the proposals suggest for U.K. in their nationality laws. The former reason that there are a lot of U.K. people living abroad ignores the fact that the same privilege of dual nationality is going to be open only to people who have recently emigrated abroad who will be few. Moreover, the number will be even lower than thought because dual nationality is likely to affect only a few countries like Canada, Australia and New Zealand from which the number of people who will wish to come to the U.K. will, as now, be small in the future. Since the system of granting U.K. citizenship by naturalization

or registration will continue, there is every reason to feel that people with U.K. connections and who wish to be its citizens will be sufficiently taken care of. Abolishing dual nationality will therefore not be as expensive or as complicated as the proposals suggest. On the contrary it will simplify the nationality laws and erase the generation of racial feelings from the contents of the law.

The problem of overseas dependencies is not one that is very complicated. At the moment there are 3.3 million citizens of the U.K. and colonies overseas of whom at least 2.6 million live in Hong Kong. Most of these people in colonies like Hong King will not want to come to the U.K. because the conditions at home are very attractive. That leaves less than 1 million people in other overseas dependencies of whom it is not suggested in the proposals that they will all want to settle in the U.K. It is submitted that the creation of an overseas U.K. citizenship would have the effect of treating them as second class citizens apart from the problems that will arise if it is created. Therefore it is submitted that in order to abolish double standards on matters of citizenship, people in the present U.K. dependencies should continue to be citizens of the U.K. and colonies in the fullest sense and accordingly they should be allowed free entry into the U.K. like other citizens.

If those two improvements are made to the proposals then it will simplify the U.K. immigration law on matters relating to entry and stay.

It only remains to mention that the remedies available to the courts for controlling the discretion of immigration authorities are few, cumbersome and too full of technicalities. As a matter of principle there should be a general right of appeal to the courts from the appeals tribunal. The courts should also avoid taking restrictive and narrow

approaches to the law. And, finally, the matters in respect of which there is no appeal either to the courts or the immigration appeals system should be reduced drastically.